

UNITED STATES DEPARTMENT OF THE INTERIOR

Fred A. Seaton, *Secretary*

George W. Abbott, *Solicitor*

**DECISIONS
OF THE
DEPARTMENT OF THE INTERIOR**

Edited by

MARIE J. TURINSKY



VOLUME 65

JANUARY-DECEMBER 1958

UNITED STATES GOVERNMENT PRINTING OFFICE, WASHINGTON : 1959

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington 25, D.C. - Price \$2.75

PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1958, to December 31, 1958. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Fred A. Seaton served as Secretary of the Interior during the period covered by this volume; Messrs. O. Hatfield Chilson and Elmer F. Bennett served successively as Under Secretary; Messrs. Fred G. Aandahl, Roger C. Ernst, Royce A. Hardy, and Ross L. Leffler served as Assistant Secretaries of the Interior; Mr. D. Otis Beasley served as Administrative Assistant Secretary; and Messrs. Elmer F. Bennett and George W. Abbott* served successively as Solicitor of the Department of the Interior. Mr. Edmund T. Fritz served as Acting Solicitor from September 21, 1958, to October 16, 1958.

This volume will be cited within the Department of the Interior as "65 I.D."

Fred A. Seaton
Secretary of the Interior.

*Mr. George W. Abbott was appointed Solicitor on October 17, 1958, and this volume is published under his direction.

EDITORIAL NOTES

United States v. Everett Foster et al., A-27421 (Jan. 8, 1958), p. 1.

Suit against the Secretary in this case was filed in the United States District Court for the District of Columbia. *Everett Foster et al. v. Fred A. Seaton, Secretary of the Interior*, Civil No. 344-58.

On December 5, 1958, defendant's motion for summary judgment was granted. The plaintiffs appealed and the case is now pending in the United States Court of Appeals for the District of Columbia Circuit, No. 14,953.

Salvatore Megna, Guardian, Philip T. Garigan, A-27528 (Jan. 20, 1958), p. 33.

Suit against the Secretary in this case has been filed in the United States District Court for the District of Columbia. *Salvatore Megna, etc. v. Fred A. Seaton, Secretary of the Interior*, Civil No. 468-58.

Max L. Krueger, Vaughan B. Connelly, A-27522 (Apr. 30, 1958), p. 185.

Suit against the Secretary in this case has been filed in the United States District Court for the District of Columbia. *Max L. Krueger v. Fred A. Seaton, Secretary of the Interior*, Civil No. 3106-58.

On June 22, 1959, the action was terminated by the filing by the plaintiff of a stipulation of dismissal without prejudice.

Union Oil Company of California, Ramon P. Colvert, A-27532 (May 28, 1958), p. 245.

Suit against the Secretary in this case has been filed in the United States District Court for the District of Columbia. *Union Oil Company of California v. Fred A. Seaton, Secretary of the Interior*, Civil No. 3042-58.

Henry S. Morgan et al., A-27529 (Aug. 27, 1958), p. 369.

Suit against the Secretary in this case has been filed in the United States District Court for the District of Columbia. *Henry S. Morgan v. Fred A. Seaton, Secretary of the Interior*, Civil No. 3248-58.

Wade McNeil et al., A-27439 (Nov. 19, 1957), 64 I.D., p. 423.

Suit against the Secretary in this case was filed in the United States District Court for the District of Columbia. *Wade McNeil v. Fred A. Seaton, Secretary of the Interior*, Civil No. 648-58.

On June 5, 1959, defendant's motion for summary judgment was granted. The plaintiff appealed and the case is now pending in the United States Court of Appeals for the District of Columbia Circuit, No. 15,351.

ERRATA

Page 109—Last paragraph, line 5, *Roughton v. Ickes*, 101 F. 2d 848, should read 101 F. 2d 248.

Page 109—Last paragraph, line 9, affirmed 283 U.S. 35, should read 283 U.S. 414.

Page 131—Antepenultimate paragraph, line 8, act of August 20, 1935, should read August 30; line 10, act of August 20, should read, act of August 26.

Page 237—Last line of penultimate paragraph, 161.6(e) (5) (*Supra*), should read 161.6(e) (5) (*Supp.*)

Page 351—The word *like* in the 4th line of text, should read *that*.

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- Dixon v. Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27.
- Douglas and Other Lodes (34 L.D. 556); modified, 43 L.D. 128.
- Dowman v. Moss (19 L.D. 526); overruled, 25 L.D. 82.
- Dudymott v. Kansas Pacific R.R. Co. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.
- Dunphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561.
- Dyche v. Beleele (24 L.D. 494); modified, 43 L.D. 56.
- Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188.
- Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355.
- East Tintic Consolidated Mining Co. (41 L.D. 255); vacated, 43 L.D. 80.
- *Elliott v. Ryan (7 L.D. 322); overruled, 8 L.D. 110. (See 9 L.D. 360.)
- El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199.
- Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.
- Emblem v. Weed (16 L.D. 28); modified, 17 L.D. 220.
- Epley v. Trick (8 L.D. 110); overruled, 9 L.D. 360.
- Erhardt, Finsans (36 L.D. 154); overruled, 38 L.D. 406.
- Esping v. Johnson (37 L.D. 709); overruled, 41 L.D. 289.
- Ewing v. Rickard (1 L.D. 146); overruled, 6 L.D. 483.
- Falconer v. Price (19 L.D. 167); overruled, 24 L.D. 264.
- Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348.
- Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 473.
- Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183.
- Federal Shale Oil Co. (53 I.D. 213); overruled so far as in conflict, 55 I.D. 290.
- Ferrell et al. v. Hoge et al. (18 L.D. 81); overruled, 25 L.D. 351.
- Fette v. Christiansen (29 L.D. 710); overruled, 34 L.D. 167.
- Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 473.
- Filtrol Company v. Brittan and Echart (51 L.D. 649); distinguished, 55 I.D. 605.
- Fish, Mary (10 L.D. 606); modified, 13 L.D. 511.
- Fisher v. Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217.
- Fitch v. Sioux City and Pacific R.R. Co. (216 L. and R. 184); overruled, 17 L.D. 43.
- Fleming v. Bowe (13 L.D. 78); overruled, 23 L.D. 175.
- Florida, State of (17 L.D. 355); reversed, 19 L.D. 76.
- Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
- Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421.
- Florida Railway and Navigation Co. v. Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237.
- Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629.
- Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505.
- Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63.
- Freeman v. Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 18.
- Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581.
- Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57.
- Gallup v. Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 304.
- Gariss v. Borin (21 L.D. 542). (See 39 L.D. 162, 225.)
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.

- Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.
- Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.
- Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 L.D. 447; overruled so far as in conflict, 59 L.D. 416, 422.
- Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
- Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.
- Goodale *v.* Olney (12 L.D. 324); distinguished, 55 L.D. 580.
- Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560.
- Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.
- Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
- Gowdy et al. *v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.
- Gregg et al. *v.* State of Colorado (15 L.D. 151); modified, 30 L.D. 310.
- Grinnell *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.
- *Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568. (See R. R. Rousseau, 47 L.D. 590.)
- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.
- Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534.
- Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442.
- Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.
- Hamilton, Hiram M. (54 L.D. 36); Instructions (51 L.D. 51), overruled so far as in conflict.
- Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.
- Hardee, D.C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.
- Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 689.
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.
- Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.
- Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427. (See 49 L.D. 413.)
- Hastings and Dakota Ry. Co. *v.* Christenson et al. (22 L.D. 257); overruled, 28 L.D. 572.
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.
- Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.
- Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 L.D. 150.
- Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.
- Heinzman et al. *v.* Letroadeec's Heirs et al. (28 L.D. 497); overruled, 38 L.D. 253.
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.
- Heirs of Philip Mulnix (33 L.D. 331); overruled, 43 L.D. 532.
- *Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Heirs of Talkington *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200.
- Heirs of Vradenberg et al. *v.* Orr et al. (25 L.D. 232); overruled, 38 L.D. 253.
- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.
- Helphrey *v.* Coil (49 L.D. 624); overruled, Dennis *v.* Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106. (See 44 L.D. 112, and 49 L.D. 484.)
- Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211.
- Herman *v.* Chase et al. (37 L.D. 590); overruled, 43 L.D. 246.

- Herrick, Wallace H. (24 L.D. 23) ; overruled, 25 L.D. 113.
- Hess, Hoy, Assignee (46 L.D. 421) ; overruled, 51 L.D. 287.
- Hickey, M. A., et al. (3 L.D. 83) ; modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464) ; vacated, 46 L.D. 17.
- Hindman, Ada I. (42 L.D. 327) ; vacated in part, 43 L.D. 191.
- Hoglund, Svan (42 L.D. 405) ; vacated, 43 L.D. 538.
- Holden, Thomas A. (16 L.D. 493) ; overruled, 29 L.D. 166.
- Holland, G. W. (6 L.D. 20) ; overruled, 6 L.D. 639 ; 12 L.D. 436.
- Holland, William C. (M. 27696), decided April 26, 1934 ; overruled in part, 55 I.D. 221.
- Hollensteiner, Walter (38 L.D. 319) ; overruled, 47 L.D. 260.
- Holman v. Central Montana Mines Co. (34 L.D. 568) ; overruled so far as in conflict, 47 L.D. 590.
- Hon v. Martinas (41 L.D. 119) ; modified, 43 L.D. 197.
- Hooper, Henry (6 L.D. 624) ; modified, 9 L.D. 86, 284.
- Howard, Thomas (3 L.D. 409). (See 39 L.D. 162, 225.)
- Howard v. Northern Pacific R.R. Co. (23 L.D. 6) ; overruled, 28 L.D. 126.
- Howell, John H. (24 L.D. 35) ; overruled, 28 L.D. 204.
- Howell, L. C. (39 L.D. 92). (See 39 L.D. 411.)
- Hoy, Assignee of Hess (46 L.D. 421) ; overruled, 51 L.D. 287.
- Hughes v. Greathead (43 L.D. 497) ; overruled, 49 L.D. 413. (See 260 U.S. 427.)
- Hull et al. v. Ingle (24 L.D. 214) ; overruled, 30 L.D. 258.
- Huls, Clara (9 L.D. 401) ; modified, 21 L.D. 377.
- Humble Oil & Refining Co. (64 I.D. 5) ; distinguished, 65 I.D. 316.
- Hunter, Charles H. (60 I.D. 395) ; distinguished, 63 I.D. 65.
- Hurley, Bertha C. (TA-66 (Ir.)), March 21, 1952, unreported ; overruled, 62 I.D. 12.
- Hyde, F. A. (27 L.D. 472) ; vacated, 28 L.D. 284.
- Hyde, F. A., et al. (40 L.D. 284) ; overruled, 43 L.D. 381.
- Hyde et al. v. Warren et al. (14 L.D. 576 ; 15 L.D. 415). (See 19 L.D. 64.)
- Ingram, John D. (37 L.D. 475). (See 43 L.D. 544.)
- Inman v. Northern Pacific R.R. Co. (24 L.D. 318) ; overruled, 28 L.D. 95.
- Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262) ; overruled so far as in conflict, 53 I.D. 228.
- Instructions (32 L.D. 604) ; overruled so far as in conflict, 50 L.D. 628 ; 53 I.D. 365 ; Lillian M. Peterson et al. (A. 20411), August 5, 1937, unreported. (See 59 I.D. 282, 286.)
- Iowa Railroad Land Co. (23 L.D. 79 ; 24 L.D. 125) ; vacated, 29 L.D. 79.
- Jacks v. Belard et al. (29 L.D. 369) ; vacated, 30 L.D. 345.
- Jackson Oil Co. v. Southern Pacific Ry. Co. (40 L.D. 528) ; overruled, 42 L.D. 317.
- Johnson v. South Dakota (17 L.D. 411) ; overruled so far as in conflict, 41 L.D. 22.
- Jones, James A. (3 L.D. 176) ; overruled, 8 L.D. 448.
- Jones v. Kennett (6 L.D. 688) ; overruled, 14 L.D. 429.
- Kackmann, Peter (1 L.D. 86) ; overruled, 16 L.D. 464.
- Kanawha Oil and Gas Co., Assignee (50 L.D. 639) ; overruled so far as in conflict, 54 I.D. 371.
- Kemp, Frank A. (47 L.D. 560) ; overruled so far as in conflict, 60 I.D. 417, 419.
- Kemper v. St. Paul and Pacific R.R. Co. (2 C.L.L. 805) ; overruled, 18 L.D. 101.
- Kilner, Harold E., et al. (A. 21845) ; February 1, 1939, unreported ; overruled so far as in conflict, 59 I.D. 258, 260.
- King v. Eastern Oregon Land Co. (23 L.D. 579) ; modified, 30 L.D. 19.

- Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.
- Kinsinger v. Peck (11 L.D. 202). (See 39 L.D. 162, 225.)
- Kiser v. Keech (7 L.D. 25); overruled, 23 L.D. 119.
- Knight, Albert B., et al. (30 L.D. 227); overruled, 31 L.D. 64.
- Knight v. Heirs of Knight (39 L.D. 362, 491; 40 L.D. 461); overruled, 43 L.D. 242.
- Kniskern v. Hastings and Dakota R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.
- Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.
- Krigbaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.
- Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45. (See 280 U.S. 306.)
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
- La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.
- Lamb v. Ullery (10 L.D. 528); overruled, 32 L.D. 331.
- Largent, Edward B., et al. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
- Lasselle v. Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
- Laughlin v. Martin (18 L.D. 112); modified, 21 L.D. 40.
- Law v. State of Utah (29 L.D. 623); overruled, 47 L.D. 359.
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 389.
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Linderman v. Wait (6 L.D. 689); overruled, 13 L.D. 459.
- *Linhart v. Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284. (See 43 L.D. 536.)
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.
- Lonergan v. Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 13.
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified, 42 L.D. 472.
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson v. Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.
- Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.

- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.
- Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536.
- Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 369.
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.
- Mather et al. *v.* Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- McBride *v.* Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.
- McCalla *v.* Acker (29 L.D. 203); vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.
- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.
- *McCraney *v.* Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.
- *McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616. (See 35 L.D. 399.)
- McFadden et al. *v.* Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.
- McHarry *v.* Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.
- McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494.
- *McKittrick Oil Co. *v.* Southern Pacific R. R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528. (See 42 L.D. 317.)
- McMicken, Herbert, et al. (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.
- McNamara et al. *v.* State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck *v.* Sullivan et al. (25 L.D. 281); overruled, 36 L.D. 26.
- *Mee *v.* Hughart et al. (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487; 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- *Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.
- Meyer *v.* Brown (15 L.D. 307). (See 39 L.D. 162, 225.)
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.
- Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.
- Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448.
- Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton et al. *v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.
- Miner *v.* Mariott et al. (2 L.D. 709); modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.
- *Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396. (See 43 L.D. 520.)
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348.
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.
- Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 308.

- Morgan v. Rowland (37 L.D. 90); overruled, 37 L.D. 618.
- Moritz v. Hinz (36 L.D. 450); vacated, 37 L.D. 382.
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.
- Morrow et al. v. State of Oregon et al. (32 L.D. 54); modified, 33 L.D. 101.
- Moses, Zelman R. (36 L.D. 473); overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.
- Mt. Whitney Military Reservation (40 L.D. 315). (See 43 L.D. 33.)
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.
- Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358.
- Nebraska, State of v. Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123.
- Neilsen v. Central Pacific R. R. Co. et al. (26 L.D. 252); modified, 30 L.D. 216.
- Newbanks v. Thompson (22 L.D. 490); overruled, 29 L.D. 108.
- Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.
- New Mexico, State of (49 L.D. 314); overruled, 54 L.D. 159.
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
- *Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129. (See 42 L.D. 313.)
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 224; overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. (21 L.D. 412; 23 L.D. 204; 25 L.D. 501); overruled, 53 L.D. 242. (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218; 177 U.S. 435.)
- Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196. (See 52 L.D. 58.)
- Northern Pacific R.R. Co. v. Bowman (7 L.D. 238); modified, 18 L.D. 224.
- Northern Pacific R.R. Co. v. Burns (6 L.D. 21); overruled, 20 L.D. 191.
- Northern Pacific R.R. Co. v. Loomis (21 L.D. 395); overruled, 27 L.D. 464.
- Northern Pacific R.R. Co. v. Marshall et al. (17 L.D. 545); overruled, 28 L.D. 174.
- Northern Pacific R.R. Co. v. Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. Co. v. Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. v. Symons (22 L.D. 686); overruled, 28 L.D. 95.
- Northern Pacific R.R. Co. v. Urquhart (8 L.D. 365); overruled, 28 L.D. 126.
- Northern Pacific R.R. Co. v. Walters et al. (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391.
- Northern Pacific R.R. Co. v. Yantis (8 L.D. 58); overruled, 12 L.D. 127.
- Nunez, Roman C. and Serapio (56 L.D. 363); overruled so far as in conflict, 57 L.D. 213.
- Nyman v. St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750.
- O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411.
- Olson v. Traver et al. (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.
- Opinion A. A. G. (35 L.D. 277); vacated, 36 L.D. 342.
- Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D. 43035, May Caramony). (See 58 L.D. 149, 154-156.)

- Opinion of Solicitor, October 31, 1917 (D. 40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D. 44083); overruled, November 4, 1921 (M. 6397). (See 58 I.D. 158, 160.)
- Opinion of Solicitor, August 8, 1933 (M. 27499); overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, Feb. 11, 1957 (M. 36410).
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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C.L.L." to Copp's Public Land Laws, edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C.L.O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—
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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

UNITED STATES v. EVERETT FOSTER ET AL.

A-27421

Decided January 8, 1958

Mining Claims: Discovery

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed, and marketed at a profit.

Mining Claims: Discovery—Mining Claims: Contests

When the Government charges that no discovery has been made within a mining claim on land open to the operation of the mining laws, the contestee may show that discovery occurred after the contest was initiated, in the absence of a withdrawal of the land from the operation of the mining laws in the interim.

Mining Claims: Determination of Validity—Rules of Practice: Evidence

In determining whether a mining claim is a valid claim, evidence detrimental to the contestee produced at the hearing through the examination and cross-examination of the contestee's witnesses may be considered.

Mining Claims: Discovery—Mining Claims: Contests

Where evidence introduced by the Government in a contest brought against the validity of a mining claim tends to show that no discovery has been made and where that evidence is supported by evidence of the contestee's witnesses and where the contestee has not been able to produce convincing evidence that a discovery has been made, the Government will prevail and the claim will be declared null and void.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by mining claimant Everett Foster and others from a decision dated September 19, 1956, by the Director of the Bureau of Land Management, wherein the Director reversed the decision of a hearing officer in holding two sand and gravel placer mining claims, Crocus No. 1 and Crocus No. 2, located on October 29, 1951, on the NE $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 29, T. 22 S., R. 61 E., M. D. M., Nevada, to be valid claims under the mining laws (30 U. S. C., 1952 ed., sec. 21 *et seq.*).

On July 10, 1953, adverse proceedings were initiated against the claims by the United States. On October 4, 1954, the United States amended its charges against the claims. As amended, the charges, as to each claim, were—

1. That minerals have not been found within the limits of the claim in sufficient quantities or quality to constitute a valid discovery.

2. That the land is more valuable for residential and/or business site purposes than for mining.

3. That there has been no actual production and sale of a valuable mineral from the claim and it has not been shown that a marketable product exists within the limits of the claim.

4. That the land was not located in good faith for mining purposes, but to control land valuable for homesites, and/or other non-mining purposes.

5. That there has been insufficient work done upon the claim to conform with the statutory requirements.

A hearing was held on the amended charges against both claims from December 6 through December 10, 1954, at which the proceedings were consolidated. The Southern Nevada Home-Sitters, Inc., acting on behalf of certain individual members of the corporation, whose applications under the Small Tract Act (43 U. S. C., 1952 ed., Supp. IV, secs. 682a-e) conflicted with the mining claims, was permitted to intervene at the hearing.

On March 30, 1955, the hearing officer rendered his decision, holding, among other things, that of the five charges brought against the claims only the first charge was material. He held that the question to be determined, under this charge, was whether the sand and gravel found on the claims could be extracted, removed and marketed at a profit. He found that the Government had not sustained its charge and that the claims are valid.

Upon review the Director held that the hearing officer had been in error in holding the third charge to be immaterial and that, while the second and fourth charges were not proper charges, evidence submitted in support thereof may be considered as bearing on the good faith of the locators in making the locations. He also held that since no evidence was introduced relating to the fifth charge it must be considered to have been abandoned at the time of the hearing. The Director held that, the Government having brought the charges against the validity of the claims, it had the burden of proving the charges with sufficient evidence to make a prima facie case, whereupon it was incumbent on the contestees to refute those charges by a preponderance of the evidence.

He found nothing in the testimony to show that the claimants had had the sand and gravel tested for its quality, its depth, or its extent or that they had done anything toward marketing the deposits until after the land had been classified for lease and sale under the Small Tract Act on October 2, 1953 (Nevada Small Tract Classification No. 95, 18 F. R. 6413). He also found that the contestees had not successfully refuted the testimony of a Government witness that no market existed for these deposits and that even on the assumption

January 8, 1958

that there was such a market at the time of the hearing, there had been no market for the sand and gravel on these claims when the land was classified for small tract purposes. He held that a prospective market is not sufficient to validate sand and gravel claims, that there must be a present actual market value. He held that the classification of the land for small tract purposes in and of itself withdrew the land from the operation of the mining laws, and that since it had not been shown that the sand and gravel deposits found within the limits of the claims, could, prior to October 2, 1953, be removed and marketed at a profit the classification attached to the land and that after the classification the contestees could not perfect their claims. He held further that the classification must be held to relate back to the filing of applications for small tract leases on these lands in order that the incipient rights of the applicants might be protected. He found that these applications had been filed a few months after the location of the claims and that since the contestees had not shown that the sand and gravel from their claims was marketable at the time of those filings any showing of marketability at the time of the hearing could avail the contestees nothing. He therefore held the claims to be invalid.

The appellants contend that the Director failed to give proper weight to the findings of fact by the hearing officer; that he erred in his evaluation of the evidence; that he committed certain procedural errors; and that the Director erred in holding that a prospective market is not sufficient to validate the claims. They contend that they discovered valuable mineral deposits on the claims in October 1951; that at that time there was a present demand for the sand and gravel as well as such a prospective market as would justify a prudent man in expending time and money in the reasonable hope of developing a paying mine; that the demand existed at the time of the hearing, and still exists. They state that if no discovery had ever been made on the claims the classification order of October 2, 1953, would have withdrawn the land from subsequent location and discovery. They contend, however, that since they made discovery prior to that date and prior to the filing of the small tract applications, it is unnecessary to consider the Director's decision with respect to the segregative effect of the small tract applications.

Under the mining laws all valuable mineral deposits in the public lands of the United States are open to exploration and purchase and the lands in which they are found are open to occupation and purchase except as they may have been withdrawn or reserved for other purposes and except as other provision may have been made for their disposition (30 U. S. C., 1952 ed., sec. 22). While the lands remain open and until other rights have attached thereto, the discovery

of a valuable mineral deposit within the limits of a claim will validate the claim (30 U. S. C., 1952 ed., secs. 23, 35) if other requirements of the law have been met. In order to satisfy the requirement of discovery on a placer mining claim located for sand and gravel,¹ it must be shown that the deposit can be extracted, removed, and marketed at a profit. This includes a favorable showing as to the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand for the sand and gravel. Associate Solicitor's opinion M-36295 (August 1, 1955); Solicitor's opinion, 54 I. D. 294 (1933); *Layman et al. v. Ellis*, 52 L. D. 714 (1929).

It should be pointed out at this time that the mere fact that sand and gravel may be sold does not in and of itself establish that a discovery of a valuable deposit of minerals has been made under the mining laws. This is clearly evidenced by the Materials Act of July 31, 1947, as originally enacted (43 U. S. C., 1952 ed., secs. 1185-1187). Section 1 of the act authorizes the Secretary of the Interior to dispose of, among other materials, sand and gravel if the disposal of such materials is not otherwise expressly authorized by law, including the mining laws. Section 1 further requires disposals to be made upon the basis of adequate compensation, with certain exceptions. Section 1, therefore, clearly reflects a congressional understanding that there are sand and gravel deposits on public lands which can be sold but which do not meet the requirements of the mining laws.²

Turning first to the issue of whether a discovery sufficient to validate these sand and gravel claims has been made, we find the contestee contending that the discovery was made prior to the time the location notices were filed. The only evidence in the record of the hearing on this point is that of Everett Foster, the only one of the locators to testify at the hearing (Tr. 401-422). Mr. Foster stated that he and his associates became interested in searching for deposits of sand and gravel in the Las Vegas area several months before these claims were located; that the interest was generated by talk he heard that there was a demand for sand and gravel; that he and his associates confined their search to the area south and east of the city because gravel pits were being operated north of the city and they were looking for another place. Mr. Foster testified that while he knows nothing about sand and gravel or operating a sand and gravel plant he talked with certain men who knew sand and gravel and that they told him that the land on which the claims were subsequently located

¹ Section 3 of the act of July 23, 1955 (30 U. S. C., 1952 ed., Supp. IV, sec. 611), provides that deposits of common varieties of sand and gravel shall not be deemed to be valuable mineral deposits within the meaning of the mining laws so as to give effective validity to any mining claim thereafter located under such laws.

² Section 1 was recently amended by the act of July 23, 1955 (*supra*, fn. 1), without pertinent change so far as the point under consideration is concerned.

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should contain good sand and gravel. He testified further that at that time there was talk of building a road near the claims but that there were no residential or business construction activities in the area of the claims. He discussed the possible sale of the gravel with several parties, one of whom had the contract to build the proposed road. That party told him he already had his own plants and "the 13 mile haul would probably be a little too far" (Tr. 415). Other parties also told him they thought the haul of 13 miles to market was a little too far at that time (Tr. 407).

On the basis of this testimony, certainly it cannot be said that a discovery of valuable mineral deposits had been made prior to the date when the claims were located. No evidence was introduced that the deposits had been tested as to either their quality or their quantity. Except for talk that there was a demand for sand and gravel, the locators had no reason to believe that the deposits on these claims could be sold at a profit in a market which may have existed at some distance from the claims.

The appellants appear to be under the impression that all that is necessary to validate sand and gravel claims is to see the sand and gravel on public domain and to file a claim thereon. Such is not the case. Before such a claim has any validity it must be shown that the sand and gravel are of a quality acceptable for the type of work being done in the market area, that the extent of the deposit is such that it would be profitable to extract it and process it if that is necessary, and that there is a present demand for the sand and gravel. The appellants having failed to make this showing, their contention that the discovery was made before October 29, 1951, must fail.

However, under the charges made by the Government, it was not necessary for the appellants to show discovery prior to the date of the location of the claims. Under the mining laws, one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of his efforts to discover valuable minerals therein. While he is in possession of the land, he is not regarded as a trespasser because he is on the land with the tacit consent of the Government. However, when the Government withdraws that consent, either by withdrawing the land from the operation of the mining laws or by the institution of adverse proceedings against the claims, the locator must show that he has made a discovery of valuable mineral deposits within the limits of the claim in order to retain his possession. When the Government withdraws the land, a discovery after the withdrawal will not serve to validate the claim. However, when adverse proceedings are instituted against a claim involving land which remains open to the operation of the min-

ing laws, discovery may be proved, even though that discovery may have been made after adverse proceedings have been started and such a discovery will permit the locator to retain possession of the land, all else being regular, and in the absence of a withdrawal of the land in the interim.

The lands involved in this proceeding were open to the operation of the mining laws when the Government challenged the validity of the claims on July 10, 1953. As that was before the land was classified for small tract purposes, a consideration of the effect of that classification will be deferred until a determination is made as to whether, on the basis of the present record, the locators met the prescribed test to give validity to sand and gravel claims, which must include a showing that the deposits can be marketed at a profit.

The evidence shows generally that sand and gravel exist in the Las Vegas area in unlimited quantities, that all of this sand and gravel is not fit for commercial use, that most of it is of poor quality, but that sand and gravel of the same quality as is found on these claims are being used commercially in the area. While the market appears to be adequately supplied at the present time, the operators of plants for the processing of sand and gravel to be used in light construction work and those using the material as it comes from the pits are always on the lookout for additional deposits to meet their needs when the deposits presently in use are exhausted. The tests they use in determining the desirability of a deposit are its quality, its depth and its distance from its ultimate place of use.

Several of the witnesses for the contestee testified that given the quality and depth assigned to these deposits by the contestees they would be good deposits, that they are not at present obtaining sand and gravel so far from the city, but that when the present supplies nearer to the city are exhausted they will have to haul from a greater distance to get suitable sand and gravel.

There is much evidence in the record with respect to whether it would be economically feasible to install a plant on the claims for the processing of sand and gravel. While William L. Shafer, the principal witness for the Government, testified that the cost of installing such a plant would be prohibitive, particularly in view of the distance of the claims from the present market, some witnesses for the contestees expressed their opinion that one might make a profit out of such an operation. They based their opinion, however, on estimates made by the contestees as to the amount of sand and gravel present on the claims. As will be shown later, there is no conclusive or even substantial proof in the record that the deposits are as extensive as the contestees claim.

No sale of the sand and gravel had occurred at the time of the hearing but testimony was given by Verne Cornell Mendenhall that

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he had made a verbal contract to buy the sand and gravel for 15 cents a yard (Tr. 504-505). The contestees have subsequently submitted a copy of a lease they have entered into with Ideal Asphalt Paving Co., Inc. (Mr. Mendenhall's firm), which authorizes the lessee to take gravel from the claims on a royalty basis of 5 cents a yard. The agreement does not, however, bind the lessee to take any specified amount of gravel. In fact, it does not bind the lessee to take any gravel and it is only slight evidence that the material on the claims is saleable. Moreover, the lease is dated August 8, 1956, a year and 8 months after Mr. Mendenhall testified to a verbal contract, and it includes the Olinda claim, which is an adjoining claim not involved here.

There is evidence, not without conflict, that the deposits on these claims are suitable for the base course in road work, without any processing, and that road building is proposed in the immediate area of the claim. Some processing (crushing, screening, etc.) is required for other road work. However, there is also evidence that wherever possible sand and gravel for road building are obtained free of charge or through arrangements whereby the sand and gravel are obtained in exchange for services. The county does not buy the sand and gravel which it uses in the construction of its roads and when it was discovered that the sand and gravel on these claims could not be obtained free of charge, the county lost interest in the claims as a source of supply (Tr. 357-358). There is also testimony to the effect that when roads are built the builders attempt to obtain the sand and gravel as close to the road as possible and that they prefer not to haul sand and gravel more than 2 miles for use on the roads. When the distance becomes greater than that, the road builder looks for another source of supply. Thus even if the sand and gravel from these claims were to be used on the proposed roads, apparently a very limited amount would be used and there is no persuasive evidence that the claimants would realize a profit from the disposition of the material.

Although the contestees had held these claims for over 3 years at the time of the hearing, they had not been able to dispose of any material from the claims, even in what they urged was an expanding market. While the fact that no sale had been made at the time of the hearing is not controlling in itself, yet it is persuasive that certain factors must have been involved which prevented the sale. If the deposits were of acceptable quality and existed in such a quantity as to make the extraction worthwhile, then if the demand were there the contestees should have been able to dispose of the material at a profit. On the other hand, if the market was such that it would not pay to extract the material and haul it to that market, then it cannot be said

that the deposits from these claims meet the test of discovery for sand and gravel claims under the mining laws.

We have on the one hand a witness for the Government testifying that the market is adequately supplied with sand and gravel from deposits nearer the market than those on the contestees' claims and that the sand and gravel on these claims are not marketable at a profit because the deposits could not compete in that market in view of the high cost of hauling the material to the present market. On the other hand, there is some evidence that the contestees could successfully compete in the present market. The strongest evidence for the contestees is that they will be able to compete in the future when the market moves closer to the claims. However, a prospective market, using that term in the sense of a market to be developed in the future, is not sufficient to establish the validity of a claim under attack at the present time.

In their appeal the contestees vigorously attack the testimony of Shafer, the principal Government witness and a mining engineer in the employ of the Bureau of Land Management. Briefly, Shafer testified that the material in the claims is of poor quality, that it is the same as material found all over the Las Vegas Valley, that the market is being adequately supplied, and that in view of the expense of mining, processing, and transporting the material he did not believe a profitable mining operation could be conducted on the claims.³ The contestees question Shafer's competence as an engineer by saying that although he examined the claims for several days, he made only a visual examination. He did not sample the gravel for testing purposes. He did not bore test holes to ascertain depth. The contestees then ridicule Shafer's competence to testify as a marketing, production, and transportation expert, but do not point out wherein his testimony was deficient or wrong on its face.

The contestees called, in addition to Foster, several witnesses whose composite testimony has been summarized. But when the testimony of each witness is examined, many weaknesses and inconsistencies are revealed. A. F. Carper, a mining engineer, was employed by the contestees to examine the claims. He testified that the gravel was of a good quality and gave estimates as to the quantity of gravel upon the basis of 6- and 8-foot depths (Tr. 276, 282). However, he did not bore any test holes to ascertain depth or to obtain samples throughout the claims. He testified only to examining development work which is confined to a 300-foot circle from a point common to the two claims and a third adjoining claim. He stated that in the center there was a bulldozed pit some 6 feet deep from which gravel had been

³ The only other Government witness was Phillip E. Mudgett, also a mining engineer of the Bureau of Land Management, who corroborated Shafer's testimony as to the poor quality of the sand and gravel on the claims but said the material was the same as that used commercially in the Las Vegas area.

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piled up and that around it were 16 trenches 2 to 3 feet deep (Tr. 275, 277). He took samples from the pit, which is 50 by 30 feet, and made a screen analysis (Tr. 298-299). Carper prepared a report of his examination (Contestees' Exhibit L).

It appears that Carper did little more than Shafer, except possibly as to the sampling and screen test. But Shafer testified that on his first examination of the claims in 1952 he obtained a sample and made a rough sieve analysis, although he did not testify directly as to the results (Tr. 65). Shafer testified the bulldozed pit had a maximum depth of 4 feet and lies only partly within the Crocus No. 1 and not within the Crocus No. 2, the latter having only a trench cut on it (Tr. 21-22), but admitted later the workings might all be on the claims (Tr. 89-90). He also spent a total of 5 days examining the claims whereas Carper spent one day (Tr. 67-68, 298). It is interesting to note with respect to the contestees' assumption from Carper's report that gravel exists throughout the claims at a minimum depth of 6 feet that in their cross-examination of Shafer they secured his admission that there is no standard test for gravel which comprehends determining the depth of a deposit from cuts and pits as much as a quarter of mile away (Tr. 132-133).

Press Lamb, superintendent for the Clark County Road Department, testified on direct examination for the contestees that he had put test holes on the claims with a bulldozer to test depth and quality and found good road gravel and lots of it (Tr. 199). On cross-examination, he said three holes were put down but that he really did not know whether he was on the claims in question and really made no tests of the sand and gravel (Tr. 200, 203). He did not say what depth of gravel was found. He testified that although the county was hauling gravel 8 miles for road work, it was "awfully costly to do it" and 2 miles or less was ideal (Tr. 202-203). Mary Dianne Claney, wife of one of the contestees named with respect to Crocus No. 2, testified that she was on the claims when Lamb began his work (Tr. 494), although Lamb had stated no one was with him but his men (Tr. 203).

Mendenhall was the only other witness to testify to the depth of the gravel. He said it was 6 feet on the bank of the gravel exposed in the excavations (Tr. 504).

From this testimony, it is evident that the depth of the gravel on the claims has been revealed in only one pit on the claims. The evidence is conflicting whether the depth exposed is 4 feet or 6 feet and there is no evidence that the depth, whatever it may be, extends throughout the claims. Thus there is no credible evidence of a discovery of gravel in commercial quantities.

Now as to quality. Shafer's testimony conflicts with Carper's.

Lamb's testimony is general but must be sharply discounted in view of the uncertainty as to whether he was on the claims and his admission that he really did not test the sand and gravel. Mendenhall testified unequivocally that the gravel is good, but by the contestees' own showing with respect to the lease his company has entered into with the contestees, as contrasted with his testimony as to a verbal contract to buy the sand and gravel, his testimony is also open to question.

In addition to these witnesses, the contestees called others. John M. Murphy, who was engaged in general contracting, testified on cross-examination that he could make no specific statement as to either the quality or quantity of sand and gravel on the Crocus claims (Tr. 376). He did not say that he had been on the claims so it must be assumed that he never examined the claims. C. D. Stewart, also engaged in construction, testified that a gravel pit 6 feet deep with the screen analysis shown in the Carper report would be very valuable and that he certainly would be interested in 80 acres of such gravel (Tr. 449). But he said he did not himself know of any sand and gravel in the Las Vegas area having the gradation shown in the Carper report (Tr. 455), and he too did not testify that he had seen or been on the claims. Elvin Hitchcock, engaged in the sand and gravel business, testified that a gravel of the Carper gradation was good gravel worth having (Tr. 472), and that he guessed, but did not know without testing, that there was gravel of that gradation in the Las Vegas area (Tr. 475). On cross-examination he testified that the gravel would have to be processed before it could be used for road gravel or for concrete (Tr. 477). He also testified that he would not go 11 miles out at the time of the hearing and get sand and gravel of the gradation shown in the Carper report and haul it to his plant for concrete aggregate purposes, that it would be very close whether he could make a profit or not (Tr. 478-479). He also did not testify that he had seen or been on the claims.

The three witnesses just mentioned, Messrs. Murphy, Stewart, and Hitchcock, obviously were not familiar with the claims, not having been on them. Murphy specifically said that he could not testify as to the quantity or quality of material on the claims. Hitchcock and Stewart testified only as to a hypothetical gravel deposit covering 80 acres with a depth of 6 feet. Even then Hitchcock said he would not go 11 miles for it, that being approximately the distance of the Crocus claims from the center of town.

One remaining witness called by the contestees was George C. Monohan, county engineer for Clark County. He testified that he had made a visual examination of the claims and that he was sure it would meet the State specifications for road work because all the gravel in the general area had been tested and met those specifications (Tr. 350). He said the gravel on the claims "is good, that is, the gravel in the

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area has always proved to be very good" for road purposes (Tr. 353). He said on cross-examination that the general area that he was talking about covered 6 to 8 miles north and south in the west side of the Las Vegas Valley (Tr. 360). He made it plain that the county was interested only in gravel that it could obtain free of charge, except for such work as the county might perform in return, like graveling a haul road for the owner of the gravel (Tr. 357-358, 364).

It may be noted at this point that of the contestees' witnesses only three definitely examined the claims. Of the three, Monohan and Mendenhall made only a visual examination, the type of examination that the contestees assail as being unscientific in regard to Shafer. Carper's examination was visual too, with respect to ascertaining the existence of chert and other deleterious substances. His only additional examination was to screen the material for size.

After a careful review of all of the testimony introduced at the hearing, the conclusion is inescapable that while the Government may not have proved conclusively by its own witnesses that the deposits on these claims could not be disposed of at a profit, the contestees' own witnesses gave testimony on direct examination and cross-examination which materially strengthens the Government's position. It is axiomatic that evidence given by a defendant's witnesses may be considered against the defendant. Taking the testimony as a whole, it must be held that the weight of the evidence is that there is no present demand for the deposits on these claims and that such deposits could not be disposed of in the present market at a profit. This being so, the Government must prevail and the claims must be held to be null and void.

It having been shown by a preponderance of the evidence that the claims are not valid claims, we do not reach the Director's holdings that the classification of the lands for small tract purposes on October 2, 1953, withdrew the lands from the operation of the mining laws and that applications for small tract leases on those lands filed prior to that date are entitled to protection.

With respect to the procedural issues raised by the contestees, nothing in the record indicates that the contestees were prejudiced in any way by any rulings which may have been made either by the hearing officer or by the Director. Under the charges brought against the claims, the contestees had the burden of showing that they had made a valid discovery within the limits of the claims. Although the Government initiated the charges and had the initial burden of sustaining at least the first charge—that there had been no discovery—if it were to prevail in the contests, once the Government had produced evidence to show that no discovery had been made, it was up to the contestees to overcome that evidence. This they failed to do.

The fact that representation was had on behalf of certain small tract applicants for the lands did not prevent the contestees from making that showing. It was their own inability to show a present market for the deposits plus the Government's showing that no such market exists which defeated them.

That one of the Government witnesses may have been permitted to read from a report which was not admitted into evidence is also immaterial. Whatever the witness may have read from a report which was not placed in evidence, the contestees were free to cross-examine him on that part of the report from which he read. Whatever else may have been contained in that report is not a part of the present record and it was not considered in reaching a determination as to the validity of the claims. It must be remembered that the technical exclusionary rules of evidence are not binding in administrative proceedings. *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (1941); *Willapoint Oysters v. Ewing*, 174 F. 2d 676, 690 (9th Cir. 1949), *cert. denied*, 388 U. S. 860.

Accordingly, and for the reasons discussed above, it must be held that the mining claims designated as Crocus No. 1 and Crocus No. 2 are without validity.

As the decision in this case turns upon the evidence adduced at the hearing and the contestees have fully set forth their analysis of the evidence, no point would be served by hearing oral argument in the case. Accordingly, the contestees' motion for oral argument is denied.

Pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Director's decision, insofar as it held the Crocus No. 1 and Crocus No. 2 to be invalid for lack of a valid discovery is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

EARL C. HARTLEY ET AL.

A-27437
A-27446
A-27447

Decided January 13, 1958

Oil and Gas Leases: Extensions—Agency

Where an oil and gas lessee applies for an extension of his entire lease despite the fact that he had previously assigned a portion of his lease to another and the assignment has been approved, he will not be considered to be an apparent or ostensible agent for the assignee in applying for the extension where there is no evidence that the lessee has ever been held out to be an agent of the assignee.

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Agency

To create an agency it is fundamental that there must be consent, express or implied, by both principal and agent that the relationship of agency shall exist.

Agency

The burden of proving agency is upon the party asserting it.

Oil and Gas Leases: Extensions—Agency

Where an oil and gas lessee applies for an extension of his entire lease despite the fact that he had previously assigned a portion of his lease to another and the assignment has been approved, he will not be considered to be the agent of the assignee in applying for the extension where there is no proof that he was designated as the assignee's agent and the circumstances surrounding his applying for the extension not only fail to show that he was acting as agent but show a situation inconsistent with the concept of agency.

Agency

A principal cannot have an agent do what the principal cannot do himself.

Oil and Gas Leases: Extensions—Applications and Entries: Filing

An application for a 5-year extension of an oil and gas lease which is filed after the close of the published office hours of a land office on the last day of the lease term is not timely filed.

Oil and Gas Leases: Extensions—Oil and Gas Leases: Applications

In order to have segregative effect so as to prevent land from being open to filing, an application for a 5-year extension of an oil and gas lease covering the land must be filed by the record titleholder of the lease, an assignee whose assignment has been filed for approval, an operator whose operating agreement has been filed for approval, or one who purports to act as agent for any of these persons.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Oil and gas lease New Mexico 05961 was issued pursuant to the provisions of the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C., 1952 ed., sec. 181 *et seq.*), to Grace E. Van Hook, effective as of September 1, 1951. The lease embraced lands described as the:

NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$	sec. 17
S $\frac{1}{2}$ NE $\frac{1}{4}$	sec. 18
NW $\frac{1}{4}$, S $\frac{1}{2}$	sec. 20

All in T. 20 S., R. 33 E., N. M. P. M., and totaling 800 acres.

Mrs. Van Hook assigned the entire lease to O. F. Swift, and he in turn assigned the lease to H. H. Anderson, the assignment to Anderson becoming effective on November 1, 1953.

On May 16, 1956, The Texas Company filed an application for approval of an assignment by Anderson to the company of the S $\frac{1}{2}$ NE $\frac{1}{4}$

sec. 18 and the SW $\frac{1}{4}$ sec. 20, containing 240 acres. This assignment was approved on May 24, 1956, effective as of June 1, 1956, and the assigned portion of Anderson's lease, New Mexico 05961, was designated as New Mexico 05961-A. The file copy of the decision approving the assignment bears a notation that the original decision went to the assignor and a copy went to the assignee.

On June 21, 1956, an application for a 5-year extension of oil and gas lease New Mexico 05961, signed by H. H. Anderson, was filed. The application was for an extension of all of the land embraced in Anderson's original lease, without regard to the approved assignment from Anderson to The Texas Company. The record does not show that any letter accompanied the application to explain the purpose of the application. No immediate action appears to have been taken on the application by the land office.

On Friday, August 31, 1956, the last day of the primary term of the lease, a telegram was sent by The Texas Company from Fort Worth, Texas, to the Santa Fe land office, requesting a 5-year extension of oil and gas lease New Mexico 05961-A. The telegram was accompanied by a telegraphic money order transmitting the sum necessary to pay the sixth year's advance rental at 50 cents per acre, plus the required \$10 filing fee. The telegram bears the time 10:56 p. m., indicating that that was the time when the wire was sent from Fort Worth. However, the company states that it instructed the telegraph company to deliver the telegram to the land office door and that it was informed by the telegraph company that delivery was made in this manner at 10:56 p. m. The telegram was time-stamped by the land office as being received on Tuesday, September 4, 1956, at 10 a. m. (Monday, September 3, being the Labor Day holiday). Some 112 persons filed applications to lease the land involved on September 4, 1956, when the land office opened to the public.

By a decision dated September 10, 1956, the manager rejected the application for extension filed by the company for the reason it was not received during the 90-day period before expiration of the lease. As to the application filed by Anderson on June 21, 1956, the manager stated:

The record shows that H. H. Anderson, on June 21, 1956, filed an application for extension of oil and gas lease NM 05961, describing therein all lands embraced in leases NM 05961 and NM 05961-A. As lease NM 05961-A was segregated from lease NM 05961, effective June 1, 1956, the application of Anderson is ineffective as to lands segregated into lease NM 05961-A, especially as there is no evidence of the authority of Anderson to act for The Texas Company, either as operator, agent, or attorney-in-fact, in connection with lease NM 05961-A.

On October 8, 1956, The Texas Company filed an appeal to the Director, Bureau of Land Management, from the manager's decision.

The company's appeal to the Director was based primarily on its

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contention that when Anderson filed his application for extension of lease New Mexico 05961 he was acting in its behalf and as its agent. In support of this contention the company offered the following asserted facts:

In September 1954, Anderson entered into an option agreement with Richardson & Bass covering the lands involved whereby Richardson & Bass agreed to pay the annual rentals on lease New Mexico 05961 in return for the right to have all of the lease or any portion thereof assigned by Anderson to them, or to their order. Richardson & Bass in turn entered into an agreement with the company on May 1, 1956, whereby the company was to drill a test well on the SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7, T. 20 S., R. 33 E., at no cost to Richardson & Bass, and in return Richardson & Bass was to procure the assignment to the company of lease New Mexico 05961 as well as other leases. Pursuant to the agreement Richardson & Bass procured the assignment from Anderson to the company, which was filed on May 16, 1956. After the assignment had been filed, R. E. Boone, chief contract and titleman for the company, discussed the matter of renewal of lease New Mexico 05961 with W. P. Duncan, Jr., landman for Richardson & Bass, and they agreed that in view of their past experience of delays in obtaining approval of assignments it was not likely that the assignment would be approved before the lease expired. Consequently, Boone and Duncan agreed that the application for extension should be filed by Anderson, the then record owner of the lease. Accordingly, Anderson filed the application for extension on June 21, 1956, at the request of Richardson & Bass and the company. At the time the application for extension was filed, neither Boone nor Duncan knew that the assignment from Anderson to the company had been approved on May 24, 1956, and Anderson in making the application did so at the instance and request of both Richardson & Bass and the company and was in fact the agent or representative of the company in making the application.

The company also contended that Richardson & Bass reimbursed Anderson for the rental of \$400 and filing fee of \$10 in connection with the application, and Richardson & Bass submitted a statement to it for the sum of \$120, its proportionate part of the rentals, which the company paid to Richardson & Bass. The company contended that it was not until 7 p. m., on August 31, 1956, that any of its representatives or officials knew of any irregularity in connection with the filing of the application for extension by Anderson, and that immediately upon learning that there might be some question with respect to the extension of the lease the company sent the telegram and money order to the land office.

In support of its contentions the company offered in evidence a photostatic copy of the option agreement between Anderson and Richardson & Bass; an affidavit signed by R. E. Boone and W. P. Duncan, Jr., as chief contract and titleman for the company and landman for Richardson & Bass, respectively; a copy of a letter dated June 8, 1956, from the Acting Director, Bureau of Land Management, to Richardson & Bass regarding their application to have certain lands (including the land in New Mexico 05961-A) committed to a unit agreement; an affidavit of E. R. Filley, vice president of the company, which stated that Boone had had authority to authorize Anderson to act as agent for the company and ratified Boone's action in authorizing the agency; photostatic copies of a statement, dated June 20, 1956, from Richardson & Bass to the company billing it for its proportionate part of the sixth year's rental, and a check from the company to Richardson & Bass for the amount of the sixth year's rental; and, finally, an affidavit from Perry R. Bass stating that W. P. Duncan had authority from Richardson & Bass to authorize Anderson to make application for the extension.

By a decision dated November 29, 1956, the Director reversed the manager's decision and held that the application for extension filed on June 21, 1956, by Anderson was valid to extend lease New Mexico 05961-A, and rejected the applications filed on September 4, 1956, by the appellants and others. From this decision Earl E. Hartley, Sherwood Dickinson, and L. O. Crosby have appealed to the Secretary of the Interior.

In his decision the Director held that after a careful review of the record he considered that Anderson acted pursuant to the authority conferred by the company and Richardson & Bass, that his action was sufficient to bind the company as principal, and that this action was ratified by reimbursement to Anderson of the moneys he had expended in that connection. Therefore, he concluded, the agency being established, the application filed by Anderson was acceptable as an informal application in behalf of the record titleholder of the lease, The Texas Company.

The pertinent provision of the Mineral Leasing Act relating to 5-year lease extensions (3d par. of sec. 17; 30 U. S. C., 1952 ed., Supp. IV, sec. 226) provides:

Upon the expiration of the initial five-year term of any noncompetitive lease * * * the record titleholder thereof shall be entitled to a single extension of the lease * * *. A noncompetitive lease, as to lands not within the known geologic structure of a producing oil or gas field, shall be extended for a period of five years and so long thereafter as oil or gas is produced in paying quantities. * * * No extension shall be granted, however, unless within a period of ninety days prior to such expiration date an application therefor is filed by the record titleholder or an assignee whose assignment has been filed for approval, or an operator whose operating agreement has been filed for approval.

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The record shows that the land involved was not within the known geologic structure of a producing oil or gas field on August 31, 1956, the expiration date of the lease, and no discovery was made during the primary term of the lease.

In his decision the Director pointed out that while the pertinent regulation of the Department (43 CFR 192.120 (b)) prescribes that a formal application for extension must be filed within 90 days before the expiration date of the lease on forms for that purpose in current use by the Department, the regulation also provides that an informal request for lease extension filed within 90 days prior to the expiration date of the lease will entitle the applicant to a notice allowing him 30 days within which to submit a formal request for lease extension on the necessary official forms or reproductions thereof (43 CFR 192.120 (c)). The Director also stated that subsection (f) of 43 CFR, 1956 Supp., 192.120 provides further that the timely filing of an application for extension shall have the effect of segregating the leased lands until the final action taken on the application is noted on the tract book, and that offers to lease filed prior to such notation will confer no rights in the offeror and will be rejected.

In commenting on the above regulation the Director stated:

While the law and regulations specify that the application may be filed by the record titleholder or in his behalf by an assignee whose assignment has been filed for approval or an operator whose operating agreement has been filed for approval, the fact that these individuals have been enumerated does not necessarily exclude others who may be acting in their behalf as agents or attorneys-in-fact. It would seem that any of the individuals named might authorize another to act in his behalf in requesting a lease extension, particularly in circumstances as involved here, where the assignee was not aware that the partial assignment of the lease had been approved and therefore sought the lease extension through its assignor as record titleholder of the lease as it existed before the assignment was approved. No reason is perceived why the enumerated individuals might not properly designate someone to act for them in this respect. The Departmental decision referred to by the appellant [*Herbert R. Lewis, Charlotte L. Murphey*, A-26819 (June 30, 1954)] supports the appellant's contention that no specific form need be filed to establish agency where an application for extension of an oil and gas lease is filed by another for the record titleholder, it being sufficient to show by substantial evidence that the person applying is acting on behalf of the record titleholder; also, that the showing of authority to act for the record titleholder need not be submitted simultaneously with the application for lease extension. Formal evidence of authority to act for a record titleholder appears necessary only where a transfer of a lease or of an interest therein is sought to be accomplished.

Both the company's appeal to the Director and the Director's decision make it clear that the position of the company and the Director is that Anderson was in fact the agent of the company when he filed his application for extension. While adhering to that position in response to the present appeals, the company also seems to intimate that

Anderson may be considered to have been an apparent agent for the company in filing the application for extension. The company so indicates by declaring that this case is not different in principle from the case of *Herbert R. Lewis, Charlotte L. Murphey, supra*. In the latter case it was stated that:

There were no specific forms required for the renewal of an existing lease. * * * A telegram, letter, or even a check that is properly noted, would be sufficient. In this case, therefore, the question is the amount of evidence that would be required to ascertain that E. J. Preston was indeed acting on behalf of Herbert R. Lewis.

There is evidence in the record that the Bureau of Land Management had prior knowledge that Mr. Preston was acting on behalf of Mr. Lewis. Correspondence had been carried on directly with Mr. Preston regarding the payment of the rent. The rent for the preceding years had been tendered by Mr. Preston and accepted by the Department. Receipts for the rent had been mailed directly to Mr. Preston by the Department. It would be unreasonable to assume the Department did not have knowledge that Mr. Preston had been acting for his employer, Mr. Lewis, in this instance.

It should be noted that in the *Lewis-Murphey* case the application for extension was signed "Richland Oil Development Co., E. J. Preston, Vice President," but on the letterhead of this letter appeared the words:

CHICAGO OFFICE:

Herbert R. Lewis, President
1609 Roanoke Building
11 South La Salle Street
Telephone—R.A. 6-2293

A comparison of the facts in the *Lewis-Murphey* case with the present case discloses a number of distinguishing features between the two cases. In the *Lewis-Murphey* case a number of transactions had occurred between Preston and the Bureau which tended to show that Preston was Lewis' agent, i. e., the fact that Preston had paid the rentals on the lease, the fact that Preston was an employee of Lewis, and, finally, the appearance of Lewis' name on the letterhead of the letter accompanying the application for extension of the lease involved. In the present case, there is not an iota of evidence to show that Anderson had ever acted as the company's agent in any of its dealings with the Bureau. There was no correspondence or record of any oral conversation between Anderson and the land office manager, or any of the office employees, which in any way indicated that Anderson was to be considered an agent for the company or had any apparent authority to act in its behalf. It was on the basis of Preston's past dealings with the land office, in which he acted in behalf of Lewis, that the Department concluded it was reasonable to assume that Preston was acting in a similar capacity when the application for extension of the Lewis lease was filed.

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The *Lewis-Murphey* decision does not spell out whether the Department felt Preston was an actual agent or merely had apparent authority to act as Lewis' agent. However, it would appear that the facts of the case gave rise to the creation of apparent authority to act as agent, which is defined by the Restatement of Law of Agency, section 27, as follows:

Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act may be created by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

None of the evidence submitted by the company with its appeal to the Director relates to any outward action taken by the company to create any degree of apparent authority in Anderson as its agent. No letter was written by either Anderson or Richardson & Bass or the company to the land office informing the manager that such was the case. In other words, until after the manager's decision rejecting the company's application for extension filed on August 31, 1956, the Bureau had never at any time been put on notice that Anderson was the company's agent. Thus, the principal basis for the Department's decision in the *Lewis-Murphey* case, i. e., the reasonable belief that on the basis of past dealing Preston was acting as an agent for Lewis, is totally absent from the factual situation in this case.

The crucial question then is whether Anderson was in fact the agent of The Texas Company when he filed his application for extension.

To create an agency it is fundamental that there must be consent on the part of both principal and agent that an agency shall exist. The principal must intend that the agent shall act for him and the agent must intend to accept the authorization and act on it. 2 Am. Jur., sec. 21; Rest., Agency, sec. 15. There need be no express agreement between the principal and agent, but if there is none, there must be facts from which consent is to be implied. *Mack v. American Security & Trust Co.*, 191 F. 2d 775 (C. A. D. C., 1951). The courts have frequently stated that the burden of proving the existence of agency is upon the party asserting it (*Gosney v. Metropolitan Life Ins. Co.*, 114 F. 2d 649, 653 (8th Cir. 1940); *Mack v. American Security & Trust Co.*, *supra*), and that agency will not be presumed or inferred because the conditions and circumstances are such as to make such an agency seem natural and probable and to the advantage of the supposed principal (*In re Thomas*, 199 Fed. 214 (D. C. N. Y. 1912)). The mere fact that one transacts business for another does not necessarily give rise to the relationship of principal and agent. *McKay v. Brink*, 275 N. W. 72 (S. Dak. 1937).

The company's proof of agency rests upon the documents and other material which were filed in support of its appeal to the Director. In addition, the company has recently furnished an affidavit dated June 17, 1957, by Anderson. None of these documents expressly creates any agency relationship between the company and Anderson. The question then is whether the documents necessarily created such a relationship or prove that it existed. This requires an examination of the documents. The first is the option agreement between Anderson and Richardson & Bass, executed on September 8, 1954. In this agreement, Anderson gave Richardson & Bass the option to purchase his oil and gas lease for a period of 3 years, subject to certain terms and conditions. The only reference to a possible third party is to be found in paragraph 4 of the agreement wherein Anderson, as optionor, agreed to execute and deliver an assignment of the lease or part of it "to Optionee [Richardson & Bass], or to the order of Optionee." This language hardly imports that Anderson was to be the agent of anyone to whom he might assign the lease. Nothing was said in the agreement about applying for extensions of the lease.

The second agreement that might be of significance is the agreement assertedly entered into by Richardson & Bass and The Texas Company on May 1, 1956. A copy of this agreement has not been furnished but it apparently contains no provision establishing an agency relationship between the company and Anderson. It is safe to assume that if such a provision existed, it would have been called to the Department's attention by the company.

The two agreements considered together have no more effect than the agreements considered individually to make Anderson in any way the agent of the company. When Richardson & Bass, in fulfillment of its agreement with the company, asked Anderson, pursuant to his agreement with Richardson & Bass, to make a partial assignment of his lease to the company, it is obvious that Anderson was not acting as an agent for the company. Anderson was acting as a principal (assignor) in relation to the company (assignee). When Anderson later filed the request for extension, what had happened to convert the relationship between him and the company into that of agent and principal? The company relies upon the agreement between Boone and Duncan that Anderson should apply for the extension and Anderson's applying for the extension pursuant to this agreement.

The facts shown as to this arrangement, however, fall considerably short of establishing that Anderson was the agent of the company. On the contrary, the arrangement was repugnant to the concept of agency. Messrs. Boone, Duncan, and Anderson all state that Anderson applied for the extension of the lease in its entirety because none of them knew that the partial assignment had been approved. They all thought that the entire lease remained in Anderson's name and

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that approval of the assignment might not occur until after the expiration of the primary term of the lease. They therefore assumed that Anderson, as the record titleholder of the entire lease, would have to apply for an extension of the entire lease in order to prevent the assignment from becoming a nullity. In other words, the arrangement made was entered into on the assumption that the company could not apply for an extension of the lease as to the portion assigned to it but that Anderson could.¹

This underlying assumption is totally inconsistent with the concept of agency. An agent "is the business representative of the principal and acts not only for the principal, but *in the place and instead of the principal*" (2 Am. Jur., sec. 7; italics added). He derives his authority to act from his principal and in effect stands in his principal's shoes. 2 Am. Jur., secs. 2, 3, 6. He "represents one who can act for himself" (*ibid.*, sec. 5). Therefore, it is wholly incompatible with the notion of agency that a principal can have an agent perform what the principal cannot do himself. The courts have so held. *In re Farley*, 106 N. E. 756 (N. Y. 1914).²

To agree with the company's contentions then is to hold that the company intended to have Anderson, as its agent, do what the company thought it, as the principal, lacked authority to do. Of course, the company in fact had authority to apply for the extension of the assigned portion of the lease and could have appointed Anderson as its agent to make the application. But the question of agency arises in this proceeding because there was no express designation of Anderson as an agent and it is necessary to determine from the action of the parties, as shown by the record, whether an agency in fact was created. On this it seems clear that the company intended to have Anderson do what the company could not do, and this is incompatible with the notion of agency.

In my opinion a far more rational view to take of the arrangement is that the parties involved (The Texas Company, Richardson & Bass, and Anderson) were simply acting to effectuate their respective agreements with each other. Richardson & Bass had agreed with the company to obtain a transfer of several leases to the company. It was natural that the company would ask Richardson & Bass to take

¹ This assumption was, of course, erroneous. The 5-year extension paragraph of section 17 of the Mineral Leasing Act, quoted earlier, specifically provides that an application for extension can be filed by "an assignee whose assignment has been filed for approval." The company would have had the right to apply for an extension of the assigned portion of the lease even if the assignment had not been approved prior to the end of the primary term of the parent lease.

² In the *Farley* case consents to the issuance of a liquor tax certificate were given by infants. The consents were signed by them personally and by one signing as their agent. The court held that the infants could not consent and that the fact that their agent signed did not make the consents valid. "It certainly is clear that an infant who cannot himself execute a consent cannot by himself and in any ordinary manner create an agent who will have greater powers than he himself possesses" [p. 758].

whatever action was necessary in order to effectuate the transfers. Anderson had agreed with Richardson & Bass to assign his lease to their order. It was natural that he would take what action was necessary, including applying for extensions, to effectuate his agreement with Richardson & Bass. It thus appears that the respective parties were working as principals within the framework of their respective agreements rather than as principals and agents. This is quite clearly shown by the fact that the company did not approach Anderson directly but only through Richardson & Bass. Anderson's application was undoubtedly of benefit to the company but it was equally beneficial to him from the standpoint of his agreement with Richardson & Bass.

As was said earlier, the burden of proving agency is upon the person asserting that an agency exists. Not only does the evidence furnished by the company fall far short of showing that Anderson was the agent of the company but it indicates affirmatively that Anderson was being called upon to do what the company thought it could not do, a notion which repels the concept of agency. Therefore, it is my conclusion that Anderson's application for extension cannot be considered to be an application by the company for an extension of the portion of his lease which was assigned to the company.

This leaves for consideration the telegraphic request for extension filed by the company on August 31, 1956.

In its brief in answer to the appellants' appeals to the Secretary the company asserts that the 5-year extension paragraph of section 17 of the Mineral Leasing Act, which provides that—

* * * No extension shall be granted, however, unless within a period of ninety days *prior to such expiration date* an application therefor is filed by the record titleholder * * * [italics added].

may be literally interpreted to mean that an owner of an oil and gas lease has until the expiration date of the lease to file an application, regardless of when the land office may be open for business; that consequently as the lease in this case would have expired at midnight on August 31, 1956, the lessee had until that time to file the application and, as a matter of fact, the application was actually filed before that time inasmuch as the telegraphic request for an extension was dropped in the land office before the expiration of the lease.

The courts have taken varying positions on this question. In *Hilker & Bletsch Co. v. United States*, 210 F. 2d 847 (7th Cir. 1954), the court held a tax claim was not timely filed where the claimant arrived at the tax office at 4:35 p. m., and found the office had closed at 4:30 p. m. The court relied on the fact that for 6 years the office had observed business hours from 8 a. m. to 4:30 p. m., even though there was no regulation establishing such hours. In *Owens-Illinois Glass Co. v. District of Columbia*, 204 F. 2d 29 (C. A. D. C., 1953), the court

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took a stricter view, holding that "in the absence of established office hours" one can file until the clock strikes at midnight of the last day and that a document deposited in an office on that day after office hours but before midnight is timely filed. The court did not say how office hours must be established in order to confine valid filings to such hours. It would seem amply clear, however, that a published regulation would be sufficient.

The Department has adopted such a regulation (43 CFR, 1956 Supp., 101.20). It provides that—

* * * The hours during which the land offices and the Washington office are open to the public for the filing of documents and inspection of records are from 10:00 a. m. to 3:00 p. m., standard time or daylight saving time, whichever is in effect at the city in which each office is located.

(b) Any document required or permitted to be filed under the regulations of this chapter, which is received in the Land office or the Washington office, either in the mail or by personal delivery when the office is not open to the public shall be deemed to be filed as of the day and hour the office next opens to the public.

This regulation became effective on July 28, 1956, and was in effect at the time the company filed its application for extension on August 31, 1956. Therefore, the company's application was properly deemed to have been filed on September 4, 1956, the first day the land office next opened after the closing on Friday, August 31, 1956, or after the expiration of the primary term of the lease.

Subsection (g) of 43 CFR, 1956 Supp., 192.120 provides that:

Upon failure of the lessee or the other persons enumerated in paragraph (a) of this section to file an application for extension within the specified period, the lease will expire at the expiration of its primary term without notice to the lessee. The lands will thereupon become subject to new filings of offers to lease.³

As the application filed by the company was filed late, it was ineffective to gain a 5-year extension for the company.

One further contention by the company remains for consideration. This is the assertion that under the provisions of 43 CFR, 1956 Supp., 192.120 (f), the applications of the appellants must be rejected. This regulation provides as follows:

(f) The timely filing of an application for extension shall have the effect of segregating the leased lands until the final action taken on the application is noted on the tract books, or, for acquired lands, on the official records relating thereto, of the appropriate land office. Prior to such notation, the lands are not available to the filing of offers to lease. Offers to lease filed prior to such notation will confer no rights in the offeror and will be rejected.

The company contends that there was a timely application filed and payment of the rental in full at the expiration date of the lease which had not been formally rejected, and that under the terms of the above-

³ The persons enumerated by subsection (a) are (1) the record titleholder of the lease; (2) an assignee whose assignment has been filed for approval; and (3) an operator whose operating agreement has been filed for approval.

quoted regulation the lands in issue were segregated until such time as final action is taken on that application. Therefore, the company argues that the applications filed by the appellants simultaneously on September 4, 1956, should be rejected.

If this contention is sound, it would not, of course, help the company in securing a 5-year extension. It would, however, require the rejection of the appellants' applications. In view of the conclusion reached in this decision that the company is not entitled to a 5-year extension, it becomes important to determine whether the appellants' applications were properly filed.

The regulation just quoted provides for the segregation of land from filing by others upon the "timely filing of an application for extension." The company's telegraphic application was not timely filed so it had no segregative effect. This leaves only Anderson's application for an extension of the entire lease. Although the regulation is not explicit, I think that, at a minimum, in order to have a segregative effect, an application for extension must be timely filed by one who is authorized to file such an application, that is, the record titleholder, an assignee whose assignment has been filed for approval, an operator whose operating agreement has been filed for approval, or one who purports to be the agent for any of the foregoing persons. In this case, Anderson did not fall into any of these categories. At the time he filed, his assignment to the company had been approved and was in effect. So far as the assigned portion of the lease was concerned, he was just as much a stranger to it as any other person. Consequently, I believe that his application for extension did not segregate the assigned lands from filing by others.

It is therefore concluded (1) that The Texas Company has failed to prove that H. H. Anderson acted as an agent for the company when he filed an application for extension of oil and gas lease New Mexico 05961 in its entirety; (2) that the attempt to apply for an extension made by The Texas Company by a telegraphic application which was received after the regular business hours of the land office were over on August 31, 1956, was filed too late to be of any effect and therefore oil and gas lease New Mexico 05961-A expired on August 31, 1956; and (3) that the oil and gas lease offers filed simultaneously by the appellants on September 4, 1956, were filed at a time when the lands were available for further leasing and should not have been rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director, Bureau of Land Management, is reversed.

EDMUND T. FRITZ,
Deputy Solicitor.

STANLEY ODLUM AND AVILA OIL COMPANY**A-27502***Decided January 13, 1958***Statutory Construction: Generally**

In determining the intention of the legislature as to whether a statute is to operate retrospectively or prospectively only, the courts have evolved a strict rule of construction against retrospective application and indulge in the presumption, in the absence of clear expression to the contrary, that the legislature intends statutes or amendments thereof to operate prospectively only.

Statutory Construction: Generally

A statute should not be applied retroactively where the intent of the legislature to have it so apply is not clearly shown and where, in addition, such retroactive application would take away property rights entitled to protection under the Constitution.

Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination

The provision of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease applies to a lease issued prior to July 29, 1954, only if the lessee has filed a written notice of his consent to have his lease bound by that provision.

Oil and Gas Leases: Rentals

Where an oil and gas lessee under a lease issued prior to July 29, 1954, has been notified that rental is coming due under his lease and that the automatic termination provision of the act of July 29, 1954, will not apply to his lease unless he files a written notice of his consent to have his lease bound by that provision and where the lessee fails to file such consent, the lessee is not entitled, upon his surrender of the lease 2 months after the fourth year's rental has accrued, to the benefit of the act of November 28, 1943.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Stanley Odlum and Avila Oil Company, through their attorneys,¹ have appealed to the Secretary of the Interior from a decision by the Director of the Bureau of Land Management dated April 19, 1957, wherein the Director affirmed the action of the manager of the land office at Santa Fe, New Mexico, in calling upon the parties to pay the fourth year's rental under four noncompetitive oil and gas leases (New Mexico 04282, 04282-A, 04285, and 04286), issued under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), and held by the parties under approved assignments,² and in

¹ The attorneys have advised the Department that Stanley Odlum died after the notice of this appeal was filed and that the appeal, in so far as it relates to the interest of Mr. Odlum, is being prosecuted for the Estate of Stanley Odlum, deceased.

² The interests of the two appellants in these and two other leases (New Mexico 04283 and 04284) are set forth in the decision of the acting manager of the Santa Fe land and survey office dated June 2, 1953.

refusing the parties' offer to compromise the claim by the payment of the accrued rental under each lease on a pro rata monthly basis for the portion of the fourth lease year which had run prior to their relinquishment of the leases on August 31, 1955.

The leases were issued as of July 1, 1952, for a primary term of 5 years. Under the provisions of section 17 of the Mineral Leasing Act and the terms of the individual leases, the fourth year's rental was due on July 1, 1955. The leases were, under the second paragraph of section 31 of the Mineral Leasing Act in force when the leases were issued (30 U. S. C., 1952 ed., sec. 188), subject to cancellation by the Secretary of the Interior, after 30 days' notice, upon the failure of the lessees to comply with any of the provisions of the leases. Section 7 of the leases provides in part:

If the lessee shall not comply with any of the provisions of the act or the regulations thereunder or make default in the performance or observance of any of the terms, covenants, and stipulations hereof *and such default shall continue for a period of 30 days after service of written notice thereof by the lessor*, the lease may be canceled by the Secretary of the Interior in accordance with section 31 of the act, as amended * * *. [Italics supplied.]

Prior to July 1, 1955, the appellants were notified that the fourth year's rental was coming due. They were also, as holders of noncompetitive oil and gas leases issued prior to July 29, 1954, notified³ that an act approved on July 29, 1954 (68 Stat. 583-585), had amended section 31 of the Mineral Leasing Act to provide that upon the failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law and that if they desired their leases to become subject to that provision they should sign the notices and return them to the land office within 30 days. The notices also stated that unless the signed notices were received the leases would not be subject to that provision of the 1954 act but that the provision would be applicable to any extension of such leases which might be made subsequent to July 29, 1954. The notices not having been returned signed and the rental under the four leases not having been paid, the parties were informed by default notices sent on August 4, 1955, that payment of the fourth year's rental was due, that the leases were in default, and that if the default continued for 30 days from the receipt of the notices the leases would be canceled without further notice and steps would be taken to collect the money due to the United States.

With their appeal from the default notices, the parties, on August 31, 1955, submitted relinquishments of the leases. They contend that under the act of July 29, 1954, their leases terminated automatically by operation of law upon their failure to pay the rental on or before

³ Form 4-1271 (August 1954).

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the anniversary date of the leases, July 1, 1955, and that therefore no money is due to the United States. They admit that prior to July 1, 1955, they received the above-mentioned notices but they contend that the automatic termination provision of the 1954 act is applicable to their leases and that therefore it was not necessary for them to elect to come within that provision of the act. They submit that their interpretation of the provision is a reasonable one. However, in the event their interpretation of the act is not accepted, they offer to pay the rent under the leases for the months of July and August, 1955. They state that the Secretary of the Interior has the authority to accept this offer under the act of November 28, 1943 (30 U. S. C., 1952 ed., sec. 188a).

The act of July 29, 1954, amends the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C., 1952 ed., sec. 181 *et seq.*), in several particulars. The automatic termination provision, with which we are here concerned, was added by section 7 of that act to the second paragraph of section 31.

Prior to the amendment made by the act, section 31 read :

Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

Any lease issued after August 21, 1935, under the provisions of section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States land office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such district, then in the post office nearest such land.

The seventh provision of the act of July 29, 1954, amends section 31^{*} by inserting immediately after the second paragraph thereof the following sentence:

Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the

^{*} The substance of the first paragraph of the section appeared as section 31 of the act as originally enacted. The second paragraph of the section was added thereto when the Mineral Leasing Act was generally amended by the act of August 8, 1946 (60 Stat. 950). Prior to that time, the substance of the second paragraph was contained in section 17 of the act as amended by the act of August 21, 1935 (49 Stat. 674).

lease shall automatically terminate by operation of law: *Provided, however*, That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made.

The appellants contend that the amendment is applicable to all oil and gas leases issued after August 21, 1935, on which there are no wells capable of producing oil or gas in paying quantities. They call attention to the fact that this act, unlike the previous amendatory act of August 8, 1946 (60 Stat. 950), does not provide that amendments made by the act shall not affect any right acquired under the law as it existed prior to the amendment and that the 1954 act does not, as did the 1946 act, afford outstanding lessees the opportunity to elect to have their leases governed by the applicable provisions of the new law instead of by the law in effect prior thereto. They refer to certain statements made by an officer of the Bureau of Land Management at the Senate hearing on the measure⁵ which seem to lend support to their argument that the provision was intended to be applicable to leases outstanding at the time the measure was adopted.

While it must be admitted that those statements seem to indicate that the provision would be applicable to outstanding leases, other statements made at the hearing by members of the committee, the Assistant Secretary of the Interior, and the Chief Counsel of the Bureau, as well as the Department's report on the bill show that it was not the understanding either of the members of the committee or the Department that the legislation, if adopted, would be retroactive in this respect.

The purpose of the amendment, which was suggested by this Department, was to provide for the automatic termination of oil and gas leases not having wells capable of producing oil or gas in paying quantities where the annual rentals had not been paid by the anniversary dates of the leases without the necessity for the cancellation procedure then set forth in the second paragraph of section 31. The cancellation procedure, in so far as it applied to defaults in the payment of rentals, had been found by experience to be both burdensome and costly to the Department and, in certain instances, to have worked hardship on lessees who, although no longer interested in their leases, nevertheless had failed to relinquish them before another annual rental had accrued. Under the law as it stood prior to the amendment, obviously, the notice required by the second paragraph of section 31, where a lessee failed to pay the rent, could not be given until after the default had occurred, at which time the rent had already accrued and had become a debt due to the United States. Furthermore, the provision of section 31, requiring 30 days' notice before such

⁵ Hearing before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs of the Senate on S. 2380, S. 2381, and S. 2382, 83d Cong., 2d sess. (May 12, 1954), at pp. 35-38.

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leases could be canceled by the Secretary of the Interior, and section 7 of the lease form then being used, under which lessees had the right to submit their rentals within 30 days after receiving notice of their failure to submit their rentals when due and thus avoid the cancellation of their leases, were found to be inconsistent with the general practice followed in preparing State and private oil and gas leases of incorporating in such leases automatic forfeiture clauses for the nonpayment of rent.

It was to relieve the Department of the heavy administrative burden incident to canceling leases where the annual rental was not paid by the anniversary dates of the leases and to bring Federal oil and gas leases in line with State and private leases in this respect that the provision was suggested. All of this was explained to the Congress when the amendment was suggested. In the Department's report⁶ on the proposed amendment of section 31, it was pointed out that the provision for automatic termination would have limited application to leases issued before the effective date of the amendment. As an instance of that limited application, it was stated that it would apply to such leases following extensions of those leases upon application therefor. In other words, it would apply to leases issued prior to July 29, 1954, only where those leases were extended after the date of the amendment.

At the beginning of the hearing, certain committee members voiced concern over whether the amendment, if adopted, would result in the automatic termination of outstanding leases. They expressed concern that the rights of existing leaseholders be protected. They were given assurance by the Assistant Secretary and the Chief Counsel of the Bureau of Land Management that those rights would be protected and that the provision was not intended to be retroactive.⁷

In determining the intention of the legislature as to whether a statute is to operate retrospectively or prospectively only, the courts have evolved a strict rule of construction against a retrospective application and indulge in the presumption, in the absence of clear expression to the contrary, that the legislature intends statutes or amendments thereof to operate prospectively only. *Hassett v. Welch*, 303 U. S. 303 (1938). As the United States Supreme Court said in *United States Fidelity and Guaranty Company v. United States for the Use and Benefit of Struthers Wells Company*, 209 U. S. 306 (1908), at p. 314:

There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are

⁶ Letter to Senator Butler, dated April 20, 1954, from the Assistant Secretary of the Interior, incorporated in the reports of the Congressional Committees on S. 2380 (S. Rept. 1809 and H. Rept. 2238, 83d Cong., 2d sess.).

⁷ Hearing, *supra*, fn. 5, pp. 13 and 14.

or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. * * *

See *General Petroleum Corporation et al.*, 59 I. D. 383, 389 (1947).

In the light of this rule, considered in conjunction with the expressed intention of both the Department and members of the legislative committee, it cannot be said that it was the intention of the Congress that the amendment would apply to leases already issued. Obviously, the amendment is susceptible of a construction that it receive prospective application only. The intention of the Congress will be completely satisfied by such a construction.

Furthermore, under the above-quoted provision of section 7 of leases issued prior to the amendment, lessees have the right to correct defaults in their performance under their leases if the correction is made within the 30-day period following their receipt of notice of the default. This right is a property right. Were such leases subjected to the automatic termination provision of the 1954 act, not only would the right to receive the 30-day notice prior to the cancellation of their leases, assured by section 31 of the Mineral Leasing Act in force when the leases were issued, but the right to correct the default within the 30-day period, granted by section 7 of their leases, be taken from the lessees. Such a construction of the amendment would do violence to the principle that the rights of individuals arising out of contracts with the United States are protected by the Fifth Amendment of the Constitution. The only case cited by the appellants in their brief on appeal to the Secretary, *Lynch v. United States*, 292 U. S. 571 (1934), clearly sets forth the principle. The appellants argue that the principle is applicable only where the legislation impairs a property right and not where it confers a benefit. However, the amendment does not confer only a benefit on lessees. Instead, it provides a different method for the termination of leases in certain circumstances from that provided for by previous legislation. If the legislation were to be construed to apply to leases outstanding at the date of its enactment, it would not only take from lessees under outstanding leases the right to receive the 30-day notice but also the right to correct the default within the time specified in their leases. These are property rights entitled to protection.

In other words, the 1954 amendment could operate either as a benefit or as a detriment to the holders of leases outstanding on the date of the amendment. The fact that in certain circumstances some persons who might no longer be interested in maintaining leases issued prior to July 29, 1954, could, if the provision were construed to be retroac-

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tive, escape the penalty of paying the rent where they had failed to relinquish their leases prior to the date on which the rent accrued does not warrant an interpretation of the legislation as conferring only a benefit on lessees. In other situations a lessee might want to retain his lease but for some reason failed to pay his rental on time. Under the terms of his lease he would have the right to pay the rental within the 30-day period following service on him of notice of default and thereby retain his lease. To hold that the 1954 amendment applied automatically to him would work a distinct detriment on him and deprive him of a contractual right. Obviously, since the application of the 1954 amendment to outstanding leases would deprive lessees of a contractual right, the legislation cannot be construed to be automatically applicable to such leases.

Nor has the Department so construed the amendment since its enactment. Shortly after the amendment became effective, it began notifying holders of outstanding leases that the amendment would not apply to their leases unless they chose to have it apply. Furthermore, a regulation promulgated shortly after the act was amended provided that any lessee of a lease issued prior to July 29, 1954, might, at any time prior to the anniversary date of such lease and the accrual of rental, elect to subject his lease to the automatic termination provision by notifying, in writing, the manager of the proper land office.^a Thus, while the Department had no authority unilaterally to change the provisions of outstanding leases, it did give the holders of such leases the opportunity to come within the scope of the amendment if they so desired. When the holders of outstanding leases elected to come within the provisions of the amendment, the change in the provisions of their leases was accomplished by the mutual consent of the lessor and the lessee.

The appellants in the present case were notified of the Department's interpretation of the amendment before the fourth year's rental on their leases became due. In the circumstances it must be held that the amendment does not apply to their leases, they having failed to elect to come within its provisions. *Noel Teuscher*, 62 I. D. 470 (1955); *Stansbury, Inc.*, A-27396 (November 20, 1956).

The leaseholders in this case, having failed to subject their leases to the automatic termination provision of the act of July 29, 1954, and having failed to relinquish their leases prior to July 1, 1955, when the fourth year's rental became due, must bear the consequences of their own acts.

Turning now to the appellants' proposal that they be permitted to pay the rental on the four leases for only that part of the fourth

^a The regulation was promulgated on December 7, 1954. It appears in sec. 192.161 (a) of the 1954 edition of Title 43 of the Code of Federal Regulations. The provision is now set forth in 43 CFR, 1956 Supp., 192.161 (b).

year which had expired prior to their relinquishment of the leases on August 31, 1955, the proposal is unacceptable. The act of November 28, 1943, upon which the appellants rely, authorizes the Secretary of the Interior to accept the surrender of any lease where the surrender is filed in the Bureau of Land Management subsequent to the accrual but prior to the payment of yearly rental due under the lease upon payment of the accrued rental on a pro rata monthly basis for the portion of the lease year prior to the filing of the surrender. However, the authority granted to the Secretary by that act:

* * * shall extend only to cases in which he finds that the failure of the lessee to file a timely surrender of the lease prior to the accrual of the rental was not due to a lack of reasonable diligence * * *.

It can hardly be said that the failure of the appellants in this case to file timely surrenders of their leases prior to July 1, 1955, was not due to a lack of reasonable diligence on their part. They were notified well before that date and before the rental accrued that the rental was coming due and that the 1954 amendment would apply to their leases only if they signed and returned the notices, electing to have their leases come within the amendment. Instead of signing and returning the notices, when they were obviously no longer interested in the leases, they chose to ignore them and to put their own interpretation on the amendment. Such action on their part does not, in the opinion of the Department, constitute reasonable diligence. At a minimum, due diligence would have called upon them to submit their interpretation of the amendment to the Department before July 1, 1955. They did not act until 2 months after that date and after notices of default had been sent to them.

Accordingly, the appellants' request that they be permitted to settle the debt owed by them to the United States by the payment of the rent under their leases for the months of July and August, 1955, instead of for the entire lease year must be denied.⁹

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

⁹ That Mr. Odum may have died after the filing of this appeal does not warrant any change in the Department's position in this respect. Under section 8 of the leases, Mr. Odum's obligations under the leases are binding upon his heirs and the executor or administrator of his estate.

*January 20, 1958***SALVATORE MEGNA, GUARDIAN,
PHILIP T. GARIGAN****A-27528***Decided January 20, 1958***Public Sales: Preference Rights**

Under the pertinent regulation a document submitted in proof of a preference-right claimant's ownership of adjoining land, proper in all other respects, is not to be rejected merely because it is not labeled a "certificate" or does not contain a statement that it is a certificate.

Public Sales: Preference Rights

Under the pertinent regulation proof of ownership of adjoining lands submitted in support of a preference-right claim is acceptable so long as it establishes ownership at or after the date of the sale, within the preference-right period, even though it is dated prior to the date on which the preference-right claim is filed.

Public Sales: Preference Rights

A document submitted under the pertinent regulation, as supporting proof of a preference-right claim, which consists only of a statement by a title company that the claimant is the grantee in the last recorded deed conveying adjoining land is insufficient either as an abstract of title or certificate of title to establish ownership in the claimant of such land.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On August 4, 1955, Elmer Amos Staggs filed an application, Arizona 09437, for the sale of 820.15 acres of public land in sec. 34, T. 15 S., R. 16 E., and secs. 3 and 4, T. 16 S., R. 16 E., G. & S. R. B. & M., Arizona, as an isolated tract pursuant to the provisions of 43 U. S. C., 1952 ed., sec. 1171. At the sale held on August 8, 1956, the bid of James E. Briggs, which was the only one received, was declared the high bid and the case was suspended for 30 days to allow preference-right claimants to assert their rights to purchase the land. Within this period James E. Briggs, Salvatore Megna, as guardian of the estate of Paul Joseph Megna, a minor, and Philip T. Garigan asserted preference-right claims. In a decision dated September 21, 1956, the manager of the Phoenix land office rejected the claims of Briggs and Garigan. On appeal, the Director of the Bureau of Land Management, in a decision dated June 11, 1957, rejected the preference-right claims of Briggs and Megna, found Garigan's claim satisfactory, and declared Garigan purchaser of the offered lands.

Thereupon Megna filed this appeal to the Secretary.¹

The statute authorizing the sale of isolated tracts provides that "* * *" for a period of not less than thirty days after the highest

¹ Briggs also attempted to appeal but his notice of appeal was rejected on August 9, 1957, by the Bureau of Land Management for failure to comply with certain procedural requirements and his case was closed.

bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands * * * (43 U. S. C., 1952 ed., sec. 1171).

The pertinent departmental regulation reads:

(b) *Preference right of purchase; declaration of purchaser.* The owners of contiguous lands have a preference right, for a period of 30 days after the highest bid has been received, to purchase the land offered for sale at the highest bid price or at three times the appraised price if three times such appraised price is less than the highest bid price. Such preference right may also be asserted at any time prior to the commencement of such period. Such preference right is not extended to the owner or owners of cornering lands.

(1) (i) A preference right to purchase must be supported by proof of the claimant's ownership of the whole title to the contiguous lands (that is, he must show that he had the whole title in fee), and must be accompanied by the purchase price of the land. * * *

(ii) Failure to submit to the land office satisfactory proof during the 30-day period after the highest bid has been received will cause the preference right to be lost as to the particular public sale. Such proof must consist of (a) a certificate of the local recorder of deeds, or (b) an abstract of title or a certificate of title prepared and certified by a title company or by an abstracting company, showing that the claimant owns adjoining land in fee simple at or after the date of the sale. However, if the preference-right claimant does not own adjoining land at the close of the preference-right period, his preference-right claim may be lost. [43 CFR 250.11 (b).]

Megna contends that he has complied with the statute and regulations and that Garigan has not. His objection to Garigan's preference-right claim rests upon the fact while Garigan filed his assertion of a preference right on September 5, 1956, his supporting proof of ownership of contiguous land filed at the same time, a "Title Information Report" prepared by the Tucson Title Information Company, is dated August 20, 1956.

Megna contends that a preference-right claimant must show proof of ownership at the time he asserts his preference right and that proof of ownership within the preference-right period but prior to the assertion of a preference-right claim is not sufficient. It was for this reason that the manager rejected Garigan's claim, but the Director held that the regulation requires only proof of ownership during the preference-right period.

The Director, of course, is correct. The regulation requires only proof that the preference-right claimant owned adjoining land "at or after the date of the sale," not proof that he owned adjoining land at the instant of asserting his preference-right claim.

Megna points out that the Director's view would permit more than one preference-right claim to be based upon ownership of the same adjoining land if a claimant disposed of his land within the preference-right period and the purchaser also filed a claim. This problem could, of course, also occur even if proof of ownership is required to be contemporaneous with the assertion of a preference-right claim because

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a claimant may during the 30-day period dispose of his land after he has asserted his claim to a purchaser who might assert his own claim within the 30-day period. While the regulation does not specifically deal with the possibility that several preference-right claims may be based upon ownership of the same adjoining land, it does state that if a claimant does not own adjoining land at the close of the preference period, his preference claim may be lost. This provision, I believe, is adequate to prevent the abuses that might otherwise occur.

Furthermore, to require proof of ownership to be contemporaneous with the filing of a preference-right claim would lead to many practical difficulties. Unless the proof were filed after the claim had been asserted, it would be difficult to have the proof run to the moment of filing. At the very least there would be an interval from the time the certificate is signed to the time it is filed.

In the more ordinary case where a preference-right claim is filed by mail, the certificate necessarily would be completed prior to mailing, yet the claim is not considered filed until received at the land office. This procedure always leaves the time between the mailing of the documents and their delivery as a gap between the time of proof and the time of filing.

Thus unless the regulation were to require that proof be filed after the assertion of a claim, which it does not, there must be some interval between the two. Once a lapse is allowed, it would be impractical to attempt to set limits as to the permissible extent of the gap. Here both Megna and Garigan owned adjoining land before, during, and after the 30-day period. For the situation in which a claimant does not own adjoining land at the end of the preference-right period, the regulation provides a remedy.

Therefore the Director properly held that proof of ownership during the preference-right period is sufficient even though it predates the filing of the preference-right claim.

The remaining issue is whether Megna filed proper documents to support his claim of ownership of adjoining land. He filed two instruments on identical printed forms, entitled "Information Report," prepared by the Tucson Title Insurance Company and signed by one of its officials. The reports are addressed to attorneys for the appellant. The first report, dated August 31, 1956, at 8:30 a. m., states:

Gentlemen:

The following information relative to the property hereinafter described is furnished on the basis of a search of our indices for matters of record in the offices of the Pima County Recorder, the Clerk of the Superior Court of Pima County, Arizona, and the Clerk of the United States District Court kept at Tucson, Arizona, up to 8:30 a. m. of the date of this report:

There follows a description of the property which adjoins the offered lands.

Then comes the following:

Name of grantee in last recorded deed: Paul Joseph Megna.

Next the dates of the deeds transferring several parcels to Paul Joseph Megna, the dates on which the deeds were recorded, and the docket number in which they were recorded are set out.

Then come several sections in which "Existing Encumbrances" are to be listed in which there are no entries except with respect to the item: "Judgments or other matters against above-named grantee or purchaser." The entry is "No liens or encumbrances, except"

1. Taxes for the year 1956, a lien by law but not yet due or payable.

The report then concludes as follows:

NOTE: This report is for use and benefit of the addressee only, and liability is hereby limited to the amount of the fee paid therefor.

Tucson Title Company By—(signed by an official of the company).

The second report, dated September 6, 1956, at 3 p. m., is substantially identical.

Megna says that this report is an abstract of title prepared and signed by an abstracting company. Without attempting to define precisely the requirements of an abstract of title, at the very least it should note more than the last transaction relating to a parcel of land. Certainly no one could form an opinion as to the ownership of the parcels described simply from the fact that the last recorded deed listed a certain person as grantee. Therefore, I conclude that the report does not qualify as an abstract of title under the pertinent regulation.

Next the appellant submits that the report is a certificate of title. The Director refused to accept it in this capacity on the ground that it had not been certified. The regulation requires neither any particular form for a certificate of title nor any particular words of art for a certification.²

If a document is proper in all other regards, the presence or absence of a specific statement that it is a certificate or that it is certified is immaterial. Therefore it was error for the Director to reject Megna's preference-right claim for the reason he did.

However, the information report is defective as a certificate of title in a more basic aspect. The regulation requires that the supporting proof show that the claimant owns adjoining property in fee simple at or after the date of the sale.

The form (form No. 4-1310, March 1956)³ suggested by the De-

² See *Higby v. Hooper*, 221 P. 2d 1043, 1051 (Mont. 1950).

³ BLM Manual, Vol. V, Chap. 2.1, Part 2, Illustration 1.

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partment is entitled "Certificate of Ownership" and reads as follows:

The undersigned certifies that the official county records of
 _____ show that _____ is
 (County) (State) (Name of bidder or applicant)
 the sole owner *in fee simple* of the following-described lands as of
 _____:
 (Date)

* * * * *

Signature _____

Title _____

(Seal)

Address _____

Date _____

[Italics in original.]

While the use of the form is not mandatory, it illustrates that the regulation requires a statement that the preference-right claimant is the owner in fee simple of adjoining property. The form submitted by Megna does not satisfy this basic requirement because it neither directly or by necessary implication states that he owns the adjoining land. A deed may be filed for record to clear up past deficiencies in title or to remove possible conflicts. In some instances a deed may be a "wild" deed, signed by a grantor who has no claim to the property conveyed. The report submitted by Megna states only that Megna was named as grantee in the last recorded deed. It is, of course, not unrelated to a statement of ownership and may, indeed, have been used as a shorthand device to convey the required information. Given its full effect, it still falls short of making the assertion required by the regulation and leaves it to the Department to draw the inference, from the fact that the claimant is the grantee named in the last recorded deed prior to the date of the sale, that he is the owner in fee simple of adjoining land.

The regulation permits the claimant to submit an abstract of title, from which the Department may make its own determination as to whether the claimant qualifies, or a certificate of title in which the requisite conclusion is stated by an organization engaged in title work. The report submitted by Megna is neither one nor the other. It is, at most, a fragment of an abstract of title and does not make a clear statement, as a certificate of title should, that the grantee in the last recorded deed is the owner of the property it describes. Therefore it cannot be accepted as the supporting proof required by the regulation.

Megna also claims that an order by a judge of the Superior Court of the State of Arizona in and for the County of Pima, dated September 5, 1956, authorizing him, as guardian, to assert a preference right

to purchase land ought to satisfy the regulation. However, the order neither describes the property on which the assertion of a preference right is based nor makes any determination as to the ownership of any land.⁴ Even if it did, it is not the type of proof specifically required by the regulation.

Finally, the appellant says that any determination that his proof is insufficient should apply equally well to that offered by Garigan. Despite his allegation that the forms submitted by him and Garigan are identical, an examination shows that they are not, although they were all prepared by the same title company. The Garigan submission is entitled "Title Information Report." It describes the adjoining land on which Garigan's preference right is based and then states:

The names of the owner (Owners) of said property is (are) as follows:

Phillip T. Garigan * * *.

Although the Director distinguished between Garigan's and the appellant's submissions on the ground that the former was a "certificate" and the latter was not, in light of what has been stated above, this distinction is not valid. However, the report Garigan submitted does contain a statement that Garigan is the owner of adjoining land at the date of the sale, whereas the appellant's does not.

Moreover, the Garigan submission contained the following information, which constitutes a complete chain of title:

Patent from the United States of America to said owner [Garigan] as patentee, dated December 16, 1942 and recorded April 17, 1950 in the office of the County Recorder of Pima County, Arizona in Docket 243 at page 285, and there appears of record no conveyance from said patentee.

Since in all respects, the Garigan report conforms with the requirements of the pertinent regulation, it was proper for the Director to recognize him as a qualified preference-right claimant.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

⁴ Megna states that the adjoining land was described in the petition to the court for authority to assert the preference right of purchase and that the petition is a part of this case record. An examination of the record discloses no such petition in the case file.

January 27, 1958

ACT OF MARCH 8, 1922 (42 STAT. 415; 48 U. S. C. SECS. 376, 377)**Alaska: Homesteads**

The act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377), is applicable to homestead applications, settlement claims, or entries where the lands covered thereby are reported by the Geological Survey as either valuable, or prospectively valuable, for coal, oil, or gas.

Alaska: Homesteads

The act of March 8, 1922, *supra*, constitutes an extension to the Territory of Alaska of the principles of the surface homestead acts in force in the public land States, namely, the acts of March 3, 1909 (35 Stat. 844; 30 U. S. C. sec. 81), June 22, 1910 (36 Stat. 583; 30 U. S. C. secs. 83-85), and July 17, 1914 (38 Stat. 509; 30 U. S. C. secs. 121-123). Therefore, the procedure set out in 43 CFR 66 and 43 CFR 102.22 should be followed.

Alaska: Homesteads

The words "before the date of issuance of a final certificate" in the act of March 8, 1922, *supra*, should be construed to mean "before the date of earning of equitable title."

Alaska: Homesteads

So far as the mineral reservation provisions of the act of March 8, 1922, *supra*, are concerned, it is immaterial whether a mineral lease application or permit application was filed prior or subsequent to the filing of a homestead application or to the initiation of a settlement claim, conflicting with the mineral application. Priority determines whether the last paragraph of 43 CFR 66.2 (b) or 43 CFR 66.6 applies.

Alaska: Homesteads

A report from the Geological Survey that land covered by a homestead application, settlement claim, or entry is prospectively valuable for one of the minerals named in the act of March 8, 1922, *supra*, is sufficient, unless satisfactory final proof on the entry has been submitted to warrant requiring the applicant, settler, or entryman, respectively, to consent to a reservation of that mineral or to assume the burden of proving that in fact the land is nonmineral in character.

Alaska: Homesteads

The applicant's, settler's or entryman's consent is required before a homestead application, settlement claim, or entry, respectively, may be impressed with a mineral reservation under the act of March 8, 1922, *supra*.

Alaska: Homesteads

If the Geological Survey reports after the date of submission of satisfactory final proof on an entry not impressed with a mineral reservation under the act of March 8, 1922, *supra*, that the land is "coal, oil or gas in character" (mineral in character), the entryman cannot be compelled to consent to such a reservation unless the Government contests the entry and proves

that before such date the land was known to be of that character. The contest cannot be based on a charge that the lands were known before that date to be "prospectively valuable" for coal, oil, or gas.

Alaska: Homesteads

If when an entry impressed with a mineral reservation under the act of March 8, 1922, *supra*, is ready for patent, the current report of the Geological Survey is that the lands have no value or prospective value for the mineral reserved and there is then an outstanding mineral lease or permit, the patent may be issued without the mineral reservation but excepting from the lands being patented the mineral covered by the lease or permit, the exception to be effective only so long as the lease or permit and rights thereunder exist.

Alaska: Mineral Leases and Permits

- ✓ A mineral lease or permit may not be issued unless and until a homestead application, settlement claim, or entry for the same land is impressed with a reservation under the act of March 8, 1922, *supra*, of the mineral covered by the lease application or permit application.

M-36483

JANUARY 27, 1958.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

This opinion is in response to your memorandum of November 6, 1957 (5.04a), asking the following questions concerning the act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377) :

1. What is the interpretation of the words "coal, oil or gas in character"? Does the term include lands which are reported as prospectively valuable for such minerals?

2. Where an application or offer for non-competitive oil and gas lease has been filed prior to the filing of notice of settlement or application for homestead entry, should the conflicting applications be adjudicated in the order of their filing regardless of the fact that the report of mineral character of the land in the homestead claim indicates that the land has no prospective value for oil and gas?

3. If the term "oil or gas in character" includes lands reported as prospectively valuable for oil and gas and the lands are so reported after the date of filing of satisfactory final proof but before the date of issuance of final certificate, must the patent issue subject to a reservation of the oil and gas to the United States?

As the three questions bring other questions to mind that are likely to arise in the future, my answers will go beyond the scope of those asked. The questions will be answered in the order in which you have them.

Question No. 1:

According to a statement (page 8070, Congressional Record, November 3, 1921) [61 Cong. Rec. 7262] made by the then ranking minority member of the Committee on the Public Lands of the House,

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when H. R. 8842, which eventually became the act of 1922 was being debated, the provision in section 1 concerning land discovered prior to the issuance of the final certificate to be "coal, oil or gas in character" was included in the bill to permit an entryman, who made a homestead entry on land believed to be nonmineral, to consent to the reservation of the mineral "should the minerals named be discovered" in the land, thus saving his entry from cancellation. This provision obviously applies to entered land on which either an actual discovery has been made before the submission of satisfactory proof or land which the Geological Survey reports before such submission to be "coal, oil or gas in character" that is, mineral in character. However, it is clear from the first sentence in section 1 of the act that the scope of the mineral reservation requirement of the act is not to be confined to entries for lands on which actual mineral discoveries have been made or for lands which the Geological Survey reports are valuable for one or more of the three minerals named in the act.

The first sentence of section 1 of the act of 1922 authorizes the initiation of homestead claims on public lands in Alaska that are "known to contain workable coal, oil or gas deposits, or that may be valuable for the coal, oil or gas contained therein." The words "may be valuable" imply that no actual exposure or discovery of valuable coal, oil or gas deposits is needed to support a requirement that a homestead claim, entry or application be made subject to a reservation to the United States of any of those minerals. Clearly the words "may be valuable" imply uncertainty as to whether there exists in the homestead lands any valuable coal, oil or gas deposits and that prospecting is needed to determine whether in fact such a deposit does exist in the lands. The Department has said with respect to the act of 1922 that "The debates in Congress when the legislation was under discussion leave no doubt that it was intended to provide for the reservation of only the mineral (coal or oil and gas) for which the land was reported or *believed* to be valuable." [Italics added.]¹

The reservation authorized by section 2 of the act to be inserted in patents includes the reservation to the United States of the right "to prospect for" the mineral reserved thus further indicating that the act contemplates the reservation of coal, oil or gas in homesteaded lands, even though the lands are not known through actual discovery or through geological inference to contain any of those minerals. In short, the act also contemplates a reservation where the Geological Survey reports that the lands are prospectively valuable for any of the three minerals. This construction of the act is consistent with departmental decisions concerning the act of July 17, 1914 (38 Stat.

¹ Departmental Instructions of May 21, 1924 (50 L. D. 497).

509; 30 U. S. C. sec. 121), an act similar to the act of 1922. The Department has held that the public domain mineral leasing act and the act of 1914 are complementary to each other.² As the act of 1914 and the Mineral Leasing Act of 1920 are each complementary to the other, there is no room for holding that a reservation under the act of 1914 must be confined to lands that are known to be valuable for a leasable mineral and consequently that no reservation under that act can be required if the homesteaded lands are reported only to be prospectively valuable for a leasable mineral. Such a holding would mean that no noncompetitive oil and gas leases ("wildcat" leases) or "wildcat" mineral prospecting permits, could be issued for the entered lands as the entry could not be impressed with a reservation of the mineral sought to be leased or prospected for. The Department has held also that a report by the Geological Survey that homesteaded lands are "prospectively valuable" (valuable for prospecting) for a leasable mineral impresses the lands with a *prima facie* mineral character sufficient to require the entryman to consent to a reservation of the mineral to the United States under the 1914 act or to assume the burden of proving that the lands in fact are nonmineral in character.³ As stated in 43 CFR 66.1 (c), the act of 1922 constitutes an extension to the Territory of Alaska of the principles of

* * * the surface homestead acts already in force in the public-land States, namely, the acts of March 3, 1909 (35 Stat. 844; 30 U. S. C. 81), June 22, 1910 (36 Stat. 583; 30 U. S. C. 83-85), and July 17, 1914 (38 Stat. 509; 30 U. S. C. 121-123).

Therefore, the procedure set out in 43 CFR 102.22 (a) and the principles of various departmental decisions concerning the act of 1914 and the other acts cited in section 66.1 (c) should be followed with respect to a homestead entry for lands reported by the Geological Survey before the filing of satisfactory final proof⁴ to be either valuable, or prospectively valuable for, one of the minerals named in the act of 1922.

Question No. 2:

Where a mineral lease application or permit application conflicts with an unallowed homestead application, a report should be requested from the Geological Survey as to whether the lands are valuable or prospectively valuable for the mineral covered by the lease or permit application. Also such a request should be made where the conflict is with a homestead entry or settlement claim not impressed

² *Marathon Oil Company v. West, United States, Intervener*, 48 L. D. 150 (1921).

³ *Foster v. Hess*, on rehearing, 50 L. D. 276 (1924); *Marcus v. Gray et al.*, 50 L. D. 288 (1924); also, see 43 CFR 192.71 (b).

⁴ See answer to question 3, as to reason "before * * * final proof" is used instead or "prior to the issuance of a final certificate" as in the act.

with a reservation under the act of 1922 of the said mineral. The request should be made even though the homestead entry contains the usual mineral report obtained from the Geological Survey before allowing the homestead application. The second request for a report is necessary because the first report from the Geological Survey may be "outdated," and, as stated above, the filing of the mineral lease or permit application impresses the land with a "*prima facie*" mineral character, which, if supported by a favorable report from the Survey, warrants requiring the entryman to consent to the mineral reservation.

So far as the mineral reservation provisions of the act of 1922 are concerned, it is immaterial whether a mineral lease offer (application), or permit application, is filed prior to, or after the filing of an application to make homestead entry or to the initiation of a settlement claim. The conflict between such a mineral application and a settlement claim or a homestead application must be finally adjudicated before either the lease or mineral permit is issued or the application to make entry is allowed. A lease or permit may not be issued until and unless the homestead application, settlement claim, or entry is impressed with a mineral reservation.⁵ The consent of the applicant, settler, or entryman to such a reservation is required.⁶

If the Geological Survey reports that the land covered by a homestead application or settlement claim has no value or prospective value for the mineral for which the lease application (offer) or permit application is filed, the application (offer) or permit application should be rejected, subject to appeal. If the Survey reports that the land has such value, the homestead applicant or settler should be required to file his consent to a reservation of the mineral under the act of 1922 or file such a showing as would overcome the conclusion of the Geological Survey.⁷

Priority as between a lease application (offer) or a permit application conflicting with a homestead application, or settlement claim, determines whether the last paragraph of 43 CFR 66.2 (b) or 43 CFR 66.6 applies. If the lease or permit applicant has priority, the homestead application, if allowed, must be allowed subject to surface use by the mineral lessee or permittee without liability for damages to crops or improvements, as set out in the last paragraph of section 66.2 (b). If the homestead applicant or settler has priority, in accordance with 43 CFR 66.6 the lease or permit applicant must file either

⁵ See *Bertram N. Beal*, 51 L. D. 162 (1925); *Leo O. LaFlame*, 49 L. D. 324 (1922); *Otrin v. Hawkins*, 48 L. D. 622 (1922); 43 CFR 192.71.

⁶ See *George W. Osburn*, 45 L. D. 77, 79 (1916); *Walter R. Freitag*, 52 L. D. 199 (1927); *Blakeney v. Womack*, 51 L. D. 622 (1926); *Garth L. Wilhelm et al.*, 62 L. D. 27 (1955); 43 CFR 192.71 (b).

⁷ *Blakeney v. Womack*, 51 L. D. 622, 624 (1926); *Walter R. Freitag*, 52 L. D. 199 (1927); 43 CFR 192.71 (b).

a bond or the applicant's or settler's waiver of damages if the homestead application is allowable or the settlement claim valid.

Question No. 3:

The general rule with respect to the homestead laws is that the date of filing of satisfactory final proof, assuming that the other requirements of those laws and the regulations thereunder have been met, is the date of vesting of equitable title in the entryman; that the subsequent issuance of the final certificate is *prima facie* evidence of such vesting; and that after the date of submission of such proof, the Government cannot maintain a contest of the entry, based on any subsequent discovery of mineral in the lands or based on after-acquired knowledge that the lands are mineral in character. Usually all of the other requirements of the regulations have been met before final proof is filed and when satisfactory proof is filed, the entryman is entitled to issuance of the final certificate and patent. However, due to administrative delay often the final certificate is not issued until after such proof has been submitted. As the final certificate is evidence of vesting of equitable title, I am of the opinion that when Congress used the words "final certificate," it meant the date of earning of equitable title, as except for administrative delay the certificate would have been issued on that date. This is consistent with the general rule as above stated which has no exceptions that I know of. Therefore, if the Geological Survey reports after that date with respect to an entry not impressed with a mineral reservation under the act of 1922 that the land is "coal, oil or gas in character," the procedure set out in 43 CFR 102.22 (b) should be followed. But as indicated in section 102.22 (b), the entryman cannot be compelled to consent to the mineral reservation unless the Government contests the entry and proves that before the date of submission of satisfactory final proof, the land was known to be "coal, oil or gas in character"; in other words prove that the land was then known to be mineral in character. The Government cannot base its contest on the charge that the lands were known prior to the date of submission of satisfactory final proof to be "prospectively valuable" (valuable for prospecting); the charge would have to be that before that date the lands were known to be mineral in character.⁸

If when an entry impressed with a mineral reservation under the act of March 8, 1922, *supra*, is ready for patenting, the current report of the Geological Survey is that the lands have no value, or prospective value, for the mineral reserved and there is then an outstanding min-

⁸ Departmental letter of October 11, 1934 (Las Cruces 031389) to the then Commissioner of the General Land Office; 43 CFR 102.22 (b).

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eral lease or permit for the lands, a patent may be issued without the mineral reservation but excepting from the lands being patented, the mineral covered by the lease or permit, the exception to be effective only so long as the lease or permit and rights thereunder exist.⁹

ELMER F. BENNETT,
Solicitor.

APPEAL OF WESTINGHOUSE ELECTRIC CORPORATION

IBCA-134

Decided January 30, 1958

Contracts: Interpretation—Contracts: Bids: Mistakes

When a supplier maintains that by excluding potheads from its bid it also intended to exclude cable and conduit but that it was misled in conveying its intention by an ambiguity in the form of the invitation, its appeal from a decision of the contracting officer, which was that the supplier was obligated to furnish the cable and conduit, presents an issue of the interpretation of the bid rather than one of mistake in bid. The circumstances of the bid also involve perhaps an issue whether a valid contract at all was made. The interpretation of a bid is a question of law which is within the jurisdiction of the Board.

BOARD OF CONTRACT APPEALS

This disposes of a motion to dismiss the appeal of the Westinghouse Electric Corporation from a decision of the contracting officer, dated September 12, 1957, under Contract No. 14-20-500-680 with the Bureau of Indian Affairs. The ground of the motion is that the Board lacks jurisdiction because the claim asserted is for equitable relief from an alleged mistake by the contractor in preparing its bid and involves no dispute of fact arising under the contract.

The contract, which was on standard form 33 (revised June 1955), and incorporated the General Provisions of standard form 32 (November 1949 edition), provided for the supply of substation equipment and steel framework for a substation at Portneuf Pumping Station, Michaud Unit, Fort Hall Irrigation Project, Fort Hall, Idaho.

The basic matter in dispute is whether appellant is obligated by the terms of the contract to supply the Government with certain quantities of cable and conduit. The cable and conduit in question were listed in the invitation for bids, but appellant claims that it did not intend to bid on the cable and conduit subitems of the invitation, and that its bid cannot properly be construed as including them. Appellant in filling out the invitation for bids and the accompanying continuation sheets expressly excluded from its bid a subitem for potheads, which immediately preceded the cable and conduit subitems,

⁹ See Solicitor's Opinions of Dec. 28, 1954, M-36254, 61 I. D. 459 and May 10, 1955, M-36254 (Supp.), 62 I. D. 177.

and it asserts that the format of the continuation sheets was such as to import that the two latter subitems were a part of the subitem for potheads, so that an exclusion of the potheads would amount to an exclusion of the cable and conduit as well. Furthermore, appellant submitted with its bid, pursuant to a requirement of paragraph 8 of the specifications accompanying the invitation, detailed specifications for the equipment it proposed to furnish, and these detailed specifications contained an express exclusion, not only of potheads, but also of cable and conduit. Reliance it also placed on the existence of a substantial disparity between the amount of appellant's bid and that of the next highest bidder.

The Government, on the other hand, contends that the subitems for cable and conduit were not a part of the potheads subitem, and that the mention of cable and conduit in the detailed specifications was not an exclusion of cable and conduit from the bid, but was merely to indicate that these materials were not covered by the particular specification in which such mention appears. It further points out that the contract was supplemented by a purchase order, signed by appellant, which contained an express exclusion of potheads, but not of cable and conduit.

The contracting officer determined that the cable and conduit in question were included in the bid, and that the furnishing of them to the Government was, therefore, a part of the obligations of the contractor under the terms of the contract.

From this outline of the circumstances, it is clear that the motion to dismiss for want of jurisdiction must be denied. The heart of the controversy is whether the bid submitted by appellant included the cable and conduit. This is a question of construction which was within the competence of the contracting officer in the first instance, and which he did determine. Likewise, the question is one that is within the competence of the Board when brought before it by an appeal. That the controversy involves the construction of written documents, and thus presents issues which are commonly considered to be questions of law, rather than questions of fact, is not sufficient, in and of itself, to warrant dismissal of the appeal, for the rules defining the Board's jurisdiction state that:

The Board may, in its discretion, decide questions which are deemed necessary for the complete decision on the issue or issues involved in the appeal, including questions of law.¹

The assertion in the motion to dismiss that the claim here involved is for equitable relief from an alleged mistake by appellant in preparing its bid assumes that the contracting officer was correct in construing

¹ 43 CFR 4.4.

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the bid as including the cable and conduit. If, contrary to his determination, the proper construction of the bid is that it excluded the cable and conduit, then the case would not be one of a mistake by appellant in preparing its bid, for under such a construction the expressed intent of the bid would be the same as the subjective intent which the motion attributes to appellant. Rather, the case might be one of a mistake by the contracting officer in accepting a bid which did not say what he thought it said. While the motion to dismiss appears to have been induced by remarks of appellant to the effect that it had made an error in interpreting the invitation for bids and in filling out the continuation sheets, nevertheless the gist of appellant's contentions is that the bid, properly construed, did not cover cable and conduit and, if this be the true meaning of the bid, its acceptance would impose upon appellant no obligation to furnish cable and conduit. Under this construction, therefore, appellant would have no occasion to seek equitable relief on the ground that it had made an error in interpreting the invitation or in filling out the continuation sheets.

The overruling of the motion to dismiss will leave before the Board the question of what is the proper interpretation of appellant's bid. Depending upon the circumstances, adoption of the interpretation urged by appellant might result in a conclusion either that no binding contract resulted from the acceptance of the bid, because of a possible material deviation of the bid from the invitation or because of a possible failure of the award to conform to the terms of the bid, or that a binding contract did come into being, but that it was one under which the obligation of appellant was to supply, for the consideration therein stated, the articles listed in the invitation exclusive of cable and conduit as well as potheads. What has just been said, however, is not to be read as expressing the opinion of the Board upon the legal consequences of any particular interpretation of the bid, since the determination of what is its correct interpretation has yet to be made.

As the motion to dismiss must be denied, Department Counsel is granted 30 days from the date of the receipt of this decision to file a statement of the Government's position and supporting brief on the merits of the claim, and the contractor is granted 15 days from the date of its receipt of the statement and brief of the Department Counsel to file a reply thereto. In the event a hearing for the purpose of taking testimony or presenting oral argument is desired by either party, a request therefor should be submitted within the respective periods stated.

The Board notes that certain documents and information which may be material to a decision on the merits are not contained in the appeal

file. These are (1) appellant's specification 294132 for transformers, which is referred to in a letter of May 24, 1957, from appellant to the contracting officer; (2) the original of the invitation for bids (standard form 33), together with a statement as to whether the words "(except potheads)" in the award box were inserted by appellant or by Government personnel; (3) the original of the three continuation sheets of the invitation (standard form 36) as filled out by appellant; (4) the bid, including continuation sheets, of the Western Electric Control & Manufacturing Company, which appears to be the only bid besides appellant's in which items 2 and 3 were bid upon separately from item 1; and (5) a statement of the extent, if any, to which the contract has been performed. It is requested that Department Counsel furnish these documents and information to the Board at the time when he submits the statement of the Government's position on the merits, and that he at the same time apprise appellant of the content of such of the documents or of the information so furnished to the Board as are not already within appellant's knowledge.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the motion to dismiss the appeal is denied.

THEODORE H. HAAS, *Chairman.*

We concur:

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

APPEAL OF BARNARD-CURTISS COMPANY

IBCA-82 (Supp.) *Decided January 23, 1958****Contracts: Appeals**

When the Board of Contract Appeals held in disposing of an appeal that the obligation of a contractor to restore a wasteway structure damaged by a storm was limited to establishing only so much of "the former earth surfaces" as would be reasonably necessary to admit of the restoration and completion of the wasteway structure, the extent of the obligation of the contractor was not limited to work within the pay or neat lines, since the Board also held that the contractor was required to fill eroded areas to the extent necessary for the restoration and completion of the contract work.

Contracts: Changes and Extras

In putting in compacted backfill, in order to restore and complete a wasteway structure damaged by a storm, the contractor was performing "extra work" rather than "compacting backfill about structures" and hence was to be paid in accordance with the provisions of the specifications governing extra work, which were that the contractor be paid "the actual necessary cost" of such work, plus an allowance of 10 percent "for superintendence, general expense, and profit." In the absence of proof to the contrary, the Board must assume that the contracting officer took into consideration, in determining the unit price of the compacted backfill, the factor of a certain amount of hand tamping, in addition to repeated passage of the equipment, in compacting the backfill.

BOARD OF CONTRACT APPEALS

In a decision dated August 9, 1957 (64 I. D. 312), the Board rejected all the claims of the contractor, except a claim for additional compensation for repairing damage to the Willow Creek Wasteway caused by an unprecedentedly heavy rainstorm which began on May 17 and continued through May 20, 1955, and which almost completely destroyed this portion of the contractor's work. The floodwaters that flowed through the construction site washed away the pipe, buried the floor of the outlet structure in mud, caused a good deal of channel degradation, eroded the excavation for the foundation for a considerable depth below the level of the structure, and considerably widened on each side beyond the specified pay lines the cut that the appellant had made through the dam.

It was the position of the contractor that even if it was required to repair the storm damage, it was not required to do repair work outside the pay or neat lines. The Government contended, on the other hand, that the contractor was negligent in not providing adequate protective works, and was, therefore, obligated to undo whatever damage had been caused by the storm.

As the Board found that the contractor had not been negligent in the conduct of its operations at the Willow Creek Wasteway, it held

*Not in chronological order.

that the contractor's obligation was only to restore the contract work that had been damaged and that, while the scope of this obligation was not so narrow that the contractor could not be required to do any work that was outside the pay or neat lines, it was not so wide that the contractor could be required to restore any Government property that may have been damaged by the storm. More specifically, the Board defined the extent of the contractor's obligation as follows:

Thus, the contractor could be required to remove any material from the excavation which had been deposited as a result of the storm, to replace any backfill which had been washed out by the storm, to restore the damaged portions of the wasteway structures, to complete those structures, and to reconstruct the segment of the dam which the contractor had excavated in order to build the wasteway. Furthermore, the contractor could be required *to fill in the areas eroded by the storm to the extent that was reasonably necessary* in order to provide adequate foundations or support for the wasteway structures together with the segment of the dam removed by the contractor, and to perform resloping operations or adopt other construction procedures to the extent that they were reasonably necessary in order to provide such foundations or support, for these steps would be essential to the restoration and completion of the contract work. But, so far as resloping, backfilling or other work in the eroded area are concerned, the obligation of the contractor was limited to reestablishing only so much of *the former earth surfaces* as would be reasonably necessary to admit of the wasteway being completed to the elevations, dimensions, and standards prescribed by the contract and to admit of the portion of the embankment removed by the contractor being replaced in like manner. The obligation could not be enlarged to the point where the contractor, who was required merely to make an opening through the embankment, would be required to rebuild other portions of it, irrespective of the relationship of this work to the restoration of the area excavated by the contractor or to the completion of other features of the contract work [italics supplied].

As the record did not show whether the contractor was required to do more than was reasonably necessary to restore and complete the contract work, the claim was remanded to the contracting officer for the purpose of making supplemental findings of fact in accordance with the views expressed by the Board, with a right to the contractor to appeal again to the Board in case it was unwilling to accept the findings.

Under date of October 28, 1957, the contracting officer made the required supplemental findings, and, under date of November 27, 1957, the contractor filed an appeal from the findings.

In the supplemental findings the contracting officer undertook to determine "what portion of the restoration of eroded material was reasonably necessary to admit of construction of structures, together with backfill, as required by the contract and, therefore, under the Board's decision, the responsibility of the contractor, and what portion of the restoration of eroded material was in addition to this requirement, and, therefore, under the Board's decision, the responsibility of the Government." On the basis of cross sections of the exca-

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vation and backfill required for Willow Creek Wasteway, the contracting officer found that the total quantity of the additional backfill was approximately 5,250 cubic yards, and that the portion thereof which was the responsibility of the Government was 1,530 cubic yards. Determining from the project records that the actual necessary average unit cost of this backfill, including the cost of resloping and compaction,¹ was approximately \$2.20 per cubic yard, the contracting officer found that the contractor was entitled to be paid \$3,366, to which he added, however, an allowance of 10 percent for superintendence, general expense and profit in accordance with paragraph A-9 of the General Conditions of the specifications, making a total proposed payment to the contractor of \$3,702.60.

The contractor attacks the supplemental findings of fact as erroneous, contending (1) that it should be paid for the entire 5,250 cubic yards of additional backfill because it is "outside of the neat or pay lines shown on the original plans," and (2) that payment should be made on the basis of a unit price of \$3.50 a cubic yard, which is the price for "Compacting backfill about structures" (item 47 of Unit No. 2 of the schedule, and paragraph 49 of the Special Provisions of the Specifications).

In its brief in support of the appeal the contractor states that it is "willing to submit the appeal on the entire record and briefs without the taking of additional testimony." The Board, therefore, will decide the appeal on the record as it has been made.

It is clear that in contending that it should be paid for the entire 5,250 cubic yards of backfill the contractor is merely reiterating its original position, which the Board has already rejected, for the Board has held that the extent of the contractor's obligation to repair the storm damage is not to be measured by the location of the neat or pay lines. The contractor has seized upon the phrase "the former earth surfaces" in the Board's definition of the extent of its obligation of repair as support for repetition of its argument in a slightly different form by contending that the Board has held that it was "the responsibility of the Government, after the flood, to rebuild the embankment up to the neat or pay lines shown on the plans," after which it would be "the responsibility of the contractor to provide such surfaces 'as would be reasonably necessary to admit of the wasteway being completed * * * and to admit of the portion of the embankment removed by the contractor being replaced'." The Board

¹ The contracting officer explained the reasons for including these costs as follows: "The cost of resloping was not segregated, as it was considered as incidental to the backfill. It was not practicable to segregate the cost of compaction, since this was accomplished mainly by passage of the equipment used in placing the backfill. The cost of resloping for and compaction of the portion of the additional backfill determined to be the responsibility of the contractor, however, was proportionately as great or greater than that of the portion of this backfill determined to be the responsibility of the Government."

made it plain, however, that it was the contractor's obligation to fill in eroded areas to the extent reasonably necessary to restore the contract work, irrespective of the location of the neat or pay lines, and "the former earth surfaces" could hardly be restored without replacing the eroded material underneath those surfaces. The contracting officer's understanding of that phrase conforms to the Board's intent, whereas the interpretation which the contractor would put upon the phrase is entirely inconsistent with that intent. As for the apportionment of the responsibility for the 5,250 cubic yards of backfill, the contractor has not challenged the correctness in any particular of the contracting officer's apportionment, and it is, therefore, accepted by the Board.

There remains, therefore, only the question whether the contracting officer's unit price determination is correct. When the contractor was directed to perform the work of restoration, it was simply being directed to perform "extra work," and the contracting officer properly determined the compensation for this work in accordance with paragraph A-9 of the General Conditions of the standard specifications, which provides in relevant part:

* * * Extra work and material will ordinarily be paid for at the lump-sum or unit price stated in the order. Whenever, in the judgment of the contracting officer, it is impracticable, because of the nature of the work or for any other reason to otherwise fix the price in the order, the extra work and material shall be paid for at the actual necessary cost as determined by the contracting officer, plus an allowance, not to exceed 10 percent of such actual necessary cost of the extra work and materials, for superintendence, general expense, and profit. * * *

As no order was entered in this case prior to the performance of the work, the amount to be paid was for determination by the contracting officer on the basis of the actual necessary cost of the work. Moreover, while the work in some respects resembled the work of "compacting backfill about structures," the contractor did not do all of it around structures, and the evidence falls far short of establishing that all, or, indeed, any substantial portion, of it was work of the same order of quality, difficulty, or expense as the work covered by the contract item for compacting backfill around structures. In short, the contractor has not proven that the cost of the work exceeded the price allowed by the contracting officer. Moreover, if the work constituted "compacting backfill about structures," the contractor would not be entitled for payment for such work outside of established pay lines, for paragraph B-13 (d) of the standard specifications, as modified by paragraph 49 of the Special Provisions provides: "Measurement for payment of compacting backfill about structures will be made only for the quantities actually compacted within the limits of the established pay lines for backfill for structures and the compacting of refill outside of excavation pay lines shall be performed at the expense of the contractor."

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The contractor also contends that the unit price of \$2.20 applied by the contracting officer was too low because compaction was accomplished not only by repeated passage of the equipment but also by hand-tamping at the sides. It is true that some hand-tamping was done (Tr., pp. 45-47, 58-59, 67-68, and 198-99) but the finding of the contracting officer was only that compaction was accomplished "mainly" by passage of the equipment, and this is entirely consistent with a certain amount of hand-tamping. In the absence of proof to the contrary, the Board must assume that the contracting officer also took the factor of hand-tamping into consideration in determining the unit price.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the supplemental findings of fact of the contracting officer dated October 26, 1957, are affirmed.

WILLIAM SEAGLE, *Member.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

THEODORE H. HAAS, Chairman of the Board, did not participate in the disposition of this appeal.

APPEAL OF QUAKER VALLEY CONSTRUCTORS, INC.

IBCA-89

Decided January 31, 1958

Contracts: Specifications—Contracts: Performance—Contracts: Interpretation

A contractor engaged in the construction of a helium plant, who was expressly required by the terms of the specifications to make "every reasonable effort" to safeguard the plans for the plant and to assure that its employees were loyal Americans, was impliedly required to bear the cost of a security check of its employees to be made by an outside investigative agency.

BOARD OF CONTRACT APPEALS

Quaker Valley Constructors, Inc., of Pittsburg, Kansas, appealed under date of November 1, 1956, from a findings of fact and decision dated October 2, 1956, of the contracting officer, holding that the contractor was obligated to pay the costs of a security check of its employees required by the terms of its contract dated September 11, 1956, with the Bureau of Mines.

The contract, which was on U. S. Standard Form 23 (revised March 1953) and incorporated the General Provisions of U. S. Standard

Form 23A (March 1953), provided for the construction of an addition to the Exell Helium Plant, near Exell, Moore County, Texas, for a consideration of \$1,006,600.

Under paragraph 4 of the specifications the work under the contract was to be completed within 180 calendar days after receipt of notice to proceed. The contractor received notice to proceed on September 20, 1956, which would have required completion of the work by March 19, 1957. However, by findings of fact dated December 9, 1957, the contracting officer extended the time of performance to June 1, 1957, the date on which the work under the contract was accepted as substantially complete.

As of the date of the contractor's appeal the work under the contract had not yet been completed, the cost of the security check had not yet been determined, and other factors in the controversy seemed obscure. The Board under date of February 28, 1957, requested, therefore, that the contracting officer make certain supplementary findings of fact. Under date of March 25, 1957, the contracting officer made additional findings but the Government requested that further findings be postponed until after the completion of the work under the contract. Under date of December 20, 1957, the contracting officer made his final supplemental findings¹ but the contractor has not submitted any comments on these findings within the time allowed by the Board,² and the Board will, therefore, proceed to dispose of the appeal in the light of the contractor's original comments.

It is stated in paragraph II of section 1 of the specifications, which defines the contract requirements, that to expedite construction the Government had purchased and would furnish "major items of equipment," and that the work under the contract would "consist principally of furnishing labor, supervision, construction equipment, and materials not furnished by the Government for constructing the plant addition and connecting it into the existing operating plant." In paragraph III of the same section of the specifications, the categories of the work to be performed by the contractor are enumerated and it is stated generally that the costs of all such work are to be included in the bid. Of particular relevance is category "G," which reads as follows:

Furnish all administrative, clerical and accounting services as set forth under Paragraph IV of this section.

¹ In these findings the contracting officer also recites that, in the course of the performance of the contract, the contractor made two claims for additional compensation but, since the contractor failed to take an appeal from the contracting officer's disposition of these claims, they are not properly before the Board, and there is no need to consider them.

² The contractor did not indeed file a reply to the original statement of the Government's position which was in the nature of a motion for judgment on the pleadings.

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Paragraph IV of section 1 of the specifications is entitled "Materials, Services, And Facilities Furnished By The Contractor." Subparagraph (1) thereof, headed "Materials," provides:

The contractor shall, *at its own expense, the cost of which shall be included in his bid*, furnish all materials, services and facilities required for completion of the work, except the materials, services and facilities furnished by the Government and listed elsewhere herein [italics supplied].

This subparagraph is followed by others imposing particular house-keeping requirements on the contractor, and it is provided that each of them is to be at the expense of the contractor, "the cost of which shall be included in his bid." Thus subparagraph 4 provides:

The Contractor shall, *at his own expense, the cost of which shall be included in his bid*, install on the plant site such building or buildings as he may require for his offices, badge and tool check stands, storage for his tools, equipment, and supplies. Upon completion of the job, all such buildings shall be removed and disposed of and the area cleaned *at no expense to the Government* [italics supplied].

Couched in similar terms are subparagraphs 5, headed "Contractor's Equipment, Machinery and Tools," subparagraph 6, headed "Contractor's Personnel," and subparagraph 7, headed "Railroad, Telephone and Telegraph," the format and phraseology of which varies somewhat for it is silent concerning the costs of rail shipments, and, with respect to telephone and telegraph, provides as follows:

Telephone and telegraph shall be at the contractor's expense, costs of which shall be included in the bid.

This provision is followed by subparagraph 8, headed "Cost Accounting" which requires the contractor to keep records and books in a certain form but without stating that the accounting shall be at the contractor's own expense.

There follows subparagraph 9, headed "Security," which is the basis of the controversy involved in this appeal, and which reads as follows:

The Contractor shall make every reasonable effort in the prosecution of the work under this contract, to safeguard drawings and specifications furnished him or prepared by him and to prevent the theft, loss, or unauthorized use of the same.

The Contractor shall make every reasonable effort to assure that his employees, representatives, or agents who are associated in any manner with the work under this contract are loyal American citizens. In any recruitment the Contractor shall make initial screening for citizenship, for absence of police record, or bad debt record, and shall obtain historical data of places of residence and employment for the past three years. Contractor shall furnish the historical data to the Retail Credit Company, or to any alternate company approved by the Contracting Officer for further loyalty and security check. The Contractor shall not employ or otherwise utilize on this contract any person that is not an American citizen. If the initial screening reveals a police record (other than minor traffic offenses), bad debt record, or other derogatory information, the person shall not be employed without the advance approval of the Contracting Officer. If personnel are hired and the subsequent Retail Credit Company or

alternate check reveals derogatory information the facts shall be called to the attention of the Contracting Officer, and if he so requests, the employee shall be removed from the work immediately.

If so requested by the Contracting Officer, the Contractor shall collect and furnish to the Contracting Officer fingerprints, photographs, or other data desired for or by the F. B. I. or other Federal, State or local officials, on any employee, agent, or representative assigned to or associated with the work under this contract.

The Government will, at the earliest practicable date, establish its own guard force at the site for security reasons. Pending this establishment, and as long thereafter as the Contracting Officer requests, the Contractor shall maintain continuously on the site sufficient guards and watchmen as required in good judgment and prudent practice in the area to prevent theft, vandalism, sabotage, or similar losses.

Contractor shall post in conspicuous places at the site such notices, placards, posters, etc., as the Contracting Officer directs relative to fire, theft, sabotage, vandalism, etc., and shall carry out promptly all requirements of authorized agencies directing national or internal security as are furnished him by the Contracting Officer.

It will be noted that no express provision is made in subparagraph 9 as to who is to bear the cost of the check to be made by the Retail Credit Company, or any alternate company approved by the contracting officer. Similarly, in subparagraph 12 of this same section of the specifications, it is provided that upon completion of all the work under the contract the contractor is to correct all permanent linen tracings and conform all specifications to "as built" conditions to the satisfaction of the contracting officer but no express provision is made that this is to be done at the expense of the contractor.

The specifications in this case are extremely voluminous because the Government was to supply long lists of materials and many services or facilities. Paragraph V of section 1 of the specifications, in which the materials to be supplied by the Government are enumerated, begins with a subparagraph in the nature of a general provision, as follows:

Materials furnished by the Government include the major items of equipment, the buildings, principal instrument items, most of the electrical items and a stock of pipe, valves and fittings, and is not the complete bill of material required.

The same subparagraph further provides:

The cost of hauling, handling, and caring for all of the materials furnished by the Government in the vicinity of the work shall be included in the bid price for the work in which the materials are to be used.

Section 2 of the specifications, which are even more voluminous, deals with the operations involved in the expansion of the helium plant, such as excavation and earthwork, concrete, construction of buildings, installation of electrical equipment, painting, etc. In general, the furnishing of the necessary plant, labor, equipment, appliances, and materials are generally declared to be the responsibility of the contractor, except where the materials, services or facilities are

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to be furnished by the Government. Sometimes provision is made, however, for a division of responsibility, as in C1.1 of "C," the part on buildings, which provides that five buildings will be "furnished by the Government completely erected on foundations furnished by the Contractor." In G-1, which deals with aboveground painting, it is specifically provided that the contractor "shall furnish all ladders, scaffolding, application equipment, etc. necessary for the completion of the work," and in G-2, which deals with belowground painting, it is expressly provided: "The contractor shall furnish all equipment required for the prosecution of the work outlined under this section."

In first advancing its claim in a letter dated September 21, 1956, the contractor stated that its estimators in submitting its bid interpreted the paragraph of the specifications as meaning that it would be required to furnish the necessary historical data for a check of its employees by the Retail Credit Company, but that actual checking would not be its responsibility. In presenting its appeal, the essence of the contractor's argument is that in view of "the inconsistency in phraseology throughout the contract in stating what was or was not to be done at the expense of the contractor," and the failure to provide expressly that the security check would be at the expense of the contractor, it should not be required to bear its cost. The contractor concedes that the specifications contain provisions under which the expense of materials, services or facilities was borne by the contractor, although no express provision to this effect was included, but contends that "these requirements specifically state what act the contractor is to perform and the expense of such performance is inherently included with the duty of performance."

The contracting officer has found that there have not been "any other disputes regarding assumption by the contractor of costs of performance of other items under the contract"; that the final cost to the contractor of the security checks required by the contract was \$1,565.00; that the contractor has already been paid \$995,837.29 under the contract; and that a further and final payment of \$118,733.76 is being processed.³

It is clear that the fact that the contractor failed to include the costs of the security check in its bid in no way improves its position. If in fact the contract provisions, properly construed, required the contractor to pay the costs of the security check, its erroneous interpretation of the provisions would constitute a unilateral mistake on its part for which neither the contracting officer nor the Board could afford relief.

³ Thus the contractor will have received a total of \$1,114,571.05 under the contract. The difference between this figure and the contract price is presumably accounted for by changes or extras.

To aid in the solution of the problem presented by the contractor's claim the Board has summarized the provisions of the specifications in greater detail than is perhaps strictly necessary for a consideration of the narrow question before it. The purpose of this summary is to show that it would be unreasonable, in case of a contract of such complexity, to expect absolute consistency of usage in making provision for every duty of the contractor and the Government under the contract. For this reason the Board does not regard it as significant that some provisions of the specifications do not expressly state that the performance of a particular duty shall be at the contractor's expense. After all, the specifications do contain a *general* provision which imposes on the contractor the expense of furnishing all services and facilities which are not the responsibility of the Government. In view of the inclusion of this provision, the failure to specify that a particular service or facility is to be furnished at the expense of the contractor does not impose the costs thereof on the Government, and, conversely, an express provision that the cost of a particular service or facility shall be borne by the contractor must be assumed to have been made only out of an abundance of caution.

It also seems to the Board that the question who shall bear the cost of a service or facility cannot be determined in terms of such an abstraction as inherency. The cost may be imposed on either party in accordance with their intentions. If any principle may be said to be "inherent" in a contract, it is that the cost of performing a service or furnishing a facility is imposed on the party who has the duty of performance, but in the present case this principle was actually embodied in the contract. This principle is indeed the crux of the question before the Board. If the contractor was required not only to gather the data on its employees but to have the data checked by an agency competent to investigate such data, the cost of this investigation was cast on the contractor by the general provision of the contract relating to the costs of services or facilities.

It seems to the Board that the duty of having the security check made was cast on the contractor by the provisions of subparagraph 9 of paragraph IV of section 1 of the specifications when read as a whole and reasonably construed. While the language of these provisions could possibly have been improved, the intent to impose the duty upon the contractor is reasonably clear, and hence the cost of discharging the duty was also imposed upon the contractor. In the very first sentence of the subparagraph, it is provided that the contractor is to make "every reasonable effort" to safeguard the drawings and specifications. These, it must be remembered, were the drawings and specifications for a helium plant, which is a defense instrumentality. Surely, it would not be reasonable to say that the plans could be said to be adequately safeguarded, if the contractor, after gathering the

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data on its employees, did not have the data checked by a competent investigative agency.

Apparently, it is the contention of the contractor, that after gathering the data it was to act merely as a forwarding agent to the investigative agency. If such, actually, was the purpose, then it would certainly have been further provided that the reports of the investigative agency based on the check be turned over in all cases to the Government, which would have had to pay the costs of the security check and whose property the reports would thereupon become. Instead, it is merely provided in the last sentence of the second paragraph of the subparagraph, that the Government shall be informed only if derogatory information has been revealed. If no such information were turned up, the Government would never see any of the reports for which it would have to pay.

The importance which the Government attached to the problem of security is made even clearer by the provisions of the third paragraph of subparagraph 9, for the Government therein imposed on the contractor a further burden of gathering still more onerous data for the F. B. I. or other police agencies, if the contracting officer should deem such data necessary. The importance of the security precautions is emphasized also by the provisions in the succeeding paragraphs for the employment of guards, and for the adoption of any other security measures which the contracting officer might regard as appropriate.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer denying the claim of the contractor are affirmed.

WILLIAM SEAGLE, *Member.*

I concur:

THEODORE H. HAAS, *Chairman.*

I dissent:

HERBERT J. SLAUGHTER, *Member.*

RIGHTS OF INDIANS IN THE HOOPA VALLEY RESERVATION, CALIFORNIA

Indian Tribes: Tribal Government

The Commissioner of Indian Affairs has been correct, as a matter of law, in recognizing tribal title to the communal lands of the 12-mile square Executive order reservation in the Hoopa Valley Tribe. The Commissioner has been further correct in paying out per capita payments as authorized gen-

erally by the act of March 2, 1907 (34 Stat. 1221), to enrolled members of the Hoopa Valley Tribe only.

Indian Lands: Tribal Lands: Generally—Indian Tribes: Tribal Government

Nothing in the Executive Order of October 16, 1891, indicates an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation. Despite the enlargement of the original Hoopa Valley Reservation, the Klamath River Tribe was never merged with nor absorbed into the Hoopa Valley Tribe. Therefore the fact that the Hoopa Valley Tribe limited the scope of its jurisdiction under its 1949 constitution does the Klamath River Indians no injustice. As an independent tribal group, neither the Klamath River Indians nor their successors, the Yuroks, have any property right in the original 12-mile square.

Indian Lands: Possessory Rights

It would be an unconstitutional taking to permit the Klamath River (Yurok) Indians to diminish the value of the right of occupancy in Hoopa Valley by paying to them a part of the proceeds of the resources taken therefrom. The Hoopa Indians have occupied this part of the reservation since 1865 and the benefits of such occupancy belong to them.

Indian Tribes: Reservations

Inasmuch as the Indian Reorganization Act provided a method of uniting the Hoopa and Klamath River Tribes, and both tribes rejected such a plan, it is our opinion that these groups remain and must be recognized as independent tribal groups until such time as they affirmatively and voluntarily form a consolidated governmental body having jurisdiction over the total reservation both as to government and as to economic resources. Such a confederation or consolidation has not taken place.

M-36450

FEBRUARY 5, 1958.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

This opinion is given in response to your request for a determination of the legality of recent per capita distributions to members of the Hoopa Valley Tribe of California. The per capita payments were made by request of the recognized governing body of the Hoopa Valley Reservation. Recipients are those persons whose names appear on the tribal membership roll approved by the Commissioner on March 25, 1952. The official membership roll approved October 1, 1949, contains the names of allottees, their descendants, unallotted residents of the 12-mile square area of Hoopa Valley who were eligible to receive allotments at the time the allotments were made, and other persons made members of the tribe by adoption.¹

It has been contended on behalf of certain members of the Yurok Tribe that Indians and their descendants who were allotted on lands

¹ Constitution and Bylaws of Hoopa Valley Tribe in California, article IV, *Membership*, approved September 4, 1952. See Appendix 1, p. 69. Cf. also letter of Superintendent Boggess to Commissioner on January 13, 1947, re Hoopa Business Council resolution declaring all lands and resources of 12 miles square to be property of Hoopa Valley Indians alone.

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formerly known as the Klamath River Reservation and on that portion of the enlarged Hoopa Valley Reservation commonly referred to as the "Connecting Strip" or "Extension" are entitled to share equally in the payments from the proceeds of timber sales on the area comprising the original Hoopa Valley Reservation. It is further alleged that the Bureau of Indian Affairs improperly authorized the disbursal of per capita payment money at the request of the Hoopa Valley Business Council because the Hoopa Valley Tribal Constitution under which it acts is invalid.

A group of Indians had been politically recognized as a Hoopa Tribe by the United States as early as 1851 when a treaty was negotiated with the "Hoo-pah" or, as they were sometimes otherwise called, the Trinity River Indians. Although this treaty was never ratified, it is convincing evidence of the existence of a Hoopa tribal group. Later, this tribal group exercised the rudiments of community government over the Indians of an area comprising the 12-mile square original Hoopa Valley Reservation and were thus qualified for political recognition as a tribe occupying the reserved group. We have seen no evidence, or contention, that any other tribal group claimed, at that time, any governmental or economic jurisdiction over the 12-mile square area of the original Hoopa Valley Reservation.

Subsequent to the admission of California as a State, the announced intent of Congress was to collect the various groups of Indians in California and to locate them on reservations set aside to afford protection against the encroachment of white settlers. On April 8, 1864 (13 Stat. 39), Congress authorized the President, in his discretion, to set aside not more than four tracts of land in California to be retained by the United States as Indian reservations, suitable in extent to accommodate the Indians in that State. The lands were to be located as remote from white settlements as possible, having due regard for their adaptability for the purpose for which they were intended. The act further provided that at least one of the reservations be located in what had theretofore been known as the "Northern District." Pursuant to this act, the Hoopa Valley Reservation was established as one of the four reservations contemplated by the legislation.

Administrative actions looking toward the setting aside of this area as an Indian reservation were begun on August 21, 1864; and by 1865 a number of Hoopa Indians had already been located in Hoopa Valley which was formally reserved by Executive order in 1876.

The Executive order establishing the Hoopa Valley Reservation provided:

EXECUTIVE MANSION, June 23, 1876. It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River, surveyed in 1875 by C. T. Bissel, and the courses and distances of the east boundary, and the portion of the north boundary east of Trinity River reported but

not surveyed by him, viz: Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked "H. V. R., No. 3"; thence south $17\frac{1}{2}^{\circ}$ west 905.15 chains to southeast corner of the reservation; thence south $72\frac{1}{2}^{\circ}$ west 480 chains to the mouth of Trinity River, be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart in California by act of Congress approved April 8, 1864. (13 Stats., p. 39.) U. S. GRANT.

It should be noted that this Executive order designates no particular tribe or class of Indians as the inhabitants of the area set aside. The order, therefore, must be construed as setting aside the reserve for the benefit of any Indians who were then occupying the area and those who availed themselves of the opportunity for settlement which the reservation presented from time to time. When the President formally set the boundaries of the Hoopa Valley Reservation on June 23, 1876 a "Hoopa Tribe," composed of remnants of the Hunstang, Hupa, Redwood, Saijaz, Sermalton, Miskut, and Tishtang-a-tan bands of Indians, was already well established thereon. This tribe became stabilized in the area and somewhere along the line adopted a constitutional form of government and ever since has maintained its local integrity. The records of the Indian Bureau show that by 1916 the group was well organized with a representative tribal council.

This [Hoopa] council is composed of Indians living on the Hoopa Valley Reservation proper and represents all of the tribes not now extinct enumerated in the Act of Congress and presidential proclamation setting aside this as an Indian Reservation * * *. The Hoopa Council are the duly authorized representatives of the Indians in Hoopa Valley Reservation.²

The "Hoopa Valley Tribe" has continually exercised tribal governmental functions within the confines of the Hoopa Valley Reservation as established by the Executive Order of June 23, 1876, and is the proper organization for carrying on the functions of administering and managing whatever communal property or land may be owned or beneficially held by that tribe. We note that the tribe in 1949 adopted a written constitution which apparently fairly included as members all persons enrolled on the official roll of the Hoopa Valley Tribe and all children, of at least one-quarter Indian blood, born to such members.

We conclude, therefore, that as a matter of law the Commissioner of Indian Affairs has been correct in recognizing tribal title to the communal lands in the 12-mile square reservation to be in the Hoopa Valley Tribe. Cf. *Spalding v. Chandler*, 160 U. S. 394 (1896), 34 Op. Atty. Gen. 181 (1924). The superior title of the Government in tribal lands and in allotted lands where no patents have been issued, implies, of course, wise management. It does not confer on the Government

² Letter from Superintendent Morsdolf to Commissioner of Indian Affairs, June 19, 1916.

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the right to despoil a tribe or an allottee of accrued rights. *St. Marie v. United States*, 24 F. Supp. 237, 240 (1938). The Commissioner has been correct in paying out per capita payments, authorized by the act of March 2, 1907 (34 Stat. 1221), only to enrolled members of the Hoopa Valley Tribe. This action is consonant with the principle that the test of the privilege of an individual Indian to share in tribal resources is tribal membership. *Halbert v. United States*, 283 U. S. 753 (1931).

We now turn our attention to the contention that Indians other than the enrolled members of the Hoopa Valley Tribe have a claim of right to an interest in the communal lands and resources of the Hoopa Valley Reservation because the 12-mile square reservation was enlarged by the addition of a contiguous area of land on which Indians of other bands were residing.

The first pertinent act of Congress providing for reservations for the Indians of California was the act of March 3, 1853 (10 Stat. 238). This act authorized the President to "make five military reservations from the public domain in the State of California * * * for Indian purposes." The act limited the area which might be reserved to 25,000 acres and appropriated \$250,000 for subsistence and costs of removing the Indians to the reserved areas. One of the areas so reserved was the Klamath River Reservation established November 16, 1855, by the Executive order of President Franklin Pierce.

In the year 1861, a flood destroyed the arable lands of the Klamath River Reservation and some of the Indians located thereon were removed to a new temporary reservation known as the Smith River Reserve, established May 3, 1862. A majority of these Indians preferred to reside on the old reservation, however, and nearly all of them returned within a few years to the Klamath River area. Meanwhile, by the act of April 8, 1864, *supra*, the State of California was constituted one superintendency for the administration of Indian affairs and the President was authorized to set apart four additional tracts of land within the State for Indian purposes. There were already in existence at that time the following reservations: Klamath River, Mendocino and Smith River. Both the Mendocino and Smith River reservations were later discontinued by the act of July 27, 1868 (15 Stat. 221, 223). During this time, the Klamath River lands were treated as a distinct reservation administered by an Indian agent of the United States who also oversaw the affairs and development of the Hoopa Valley Reservation approximately 20 miles away. As an aid to the administration of these two separated areas, they were brought together later under the Executive Order of October 16, 1891, which reads as follows:

EXECUTIVE MANSION, October 16, 1891. It is hereby ordered that the limits of the Hoopa Valley Reservation, in the State of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart in said State by act of Congress approved April 8, 1864 (13 Stats., 39), be, and the same are hereby, extended so as to include a tract of country 1 mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley Reservation to the Pacific Ocean: *Provided, however*, That any tract or tracts included within the above-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended. BENJ. HARRISON.

The limits of the Hoopa Valley Reservation were thus extended by the Executive Order of October 16, 1891, to include a tract of land containing approximately 25,635 acres, 1 mile in width on each side of the Klamath River, extending from the limits of the Hoopa Valley Reservation to the Pacific Ocean. This enlarged Hoopa Reservation took a shape similar to that of a spoon with the Hoopas located in its bowl and the Klamath River Indians strung out along its handle. The following year, under the act of June 17, 1892, Congress discontinued the Klamath River Reservation as such, but preserved some rights for Indians previously located on that reservation by providing for allotments to all Indian applicants who made their selection thereon within 1 year. All lands not selected for allotment were opened to settlement under the public land laws. Indians who removed from the former Klamath River Reservation were relocated on the connecting strip and elsewhere, and the Klamath River Tribe became widely scattered.

The Klamath River Indians, whose ancestors formerly resided on the Klamath River Reservation, have consistently been regarded as an identifiable tribe by the Federal Government. See 33 L. D. 205, 218 (1904). These Indians are also included in the general term "Yurok" meaning downstream Indians although a Yurok Tribe, as such, was not organized until recent years. The "Yurok Tribe" has never been recognized as having jurisdiction over any part of the "Hoopa Extension" because its membership is not confined to reservation Indians.³

We can find no evidence to indicate that the enlargement of the reservation was intended in any way to upset the property interests of the Hoopa Tribe to the original area under its jurisdiction. We read nothing in the Executive Order of 1891 to show an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation.

The former Klamath River Reservation and the connecting strip are, technically, a part of the enlarged Hoopa Valley Reservation.

³ Yurok Tribe, incorporated under laws of California, October 24, 1949. The organization is recognized for the purposes for which it was formed namely "to promote the cultural, social, educational and economical well being of members of the Yurok Tribe." Letter from Assistant Commissioner to Mrs. Lowana Brantner, November 26, 1954.

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However, to construe the order enlarging the Hoopa Valley Reservation as divesting the Hoopa Valley Tribe of their rights in their communal property would be contrary to established law. The rights of Indians to property within reservations attach when the lands are set aside. 34 Op. Atty. Gen. 171, 176 (1924). *United States v. Santa Fe Pacific R. R. Co.*, 314 U. S. 339 (1941). The rights of the Hoopa Indians to the Hoopa Valley Reservation antedate the Executive Order of 1891. Such vested rights in the land are not affected, without the tribe's consent, by a subsequent order enlarging the area of the reservation. To distribute the income from the assets of the original part of the Hoopa Valley Reservation to all the Indians in the Northern District of California would be to give to many of them the benefit of a right to which they are not entitled. Congress, as a trustee for unassimilated Indians, has power to legislate for the proper control and management of such of their property as is held by the Government in a trust capacity, but this power is not so extensive as to enable the Government "to give the tribal lands to others, or to appropriate them to his own purposes, without rendering, or assuming an obligation to render, just compensation * * *; for that 'would not be an exercise of guardianship, but an act of confiscation.'" *United States v. Creek Nation*, 295 U. S. 103, 110 (1935), citing *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, 113 (1919); *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307-308 (1902). Cf. *United States v. Klamath and Moadoc Tribes et al.*, 304 U. S. 119 (1938). It would be an unconstitutional taking diminishing the value of the Hoopa Indians' right of occupancy, if the Klamath River (Yurok) Indians were permitted to share the proceeds of the resources taken from the 12-mile square. The Hoopa Indians have occupied the 12-mile square area of the reservation since 1865 and the benefits of such occupancy belong to them. *Shoshone Tribe v. United States*, 299 U. S. 476, 496 (1937). Each and every individual member of the many tribes or bands of California Indians was privileged after 1865 to settle upon this reservation. None of them was required to do so. Those who accepted became vested with the full incidents of Indian title. Those who did not accept, and chose to remain where they were, or move elsewhere, cannot be properly regarded as being invested with enforceable rights thereon either in themselves or in their posterity. Cf. Sol. Op. M-36181, Ownership of Unallotted Lands on the Tulalip Indian Reservation in the State of Washington, February 21, 1956.

It has been alleged that the Hoopas withdrew from an existing Hoopa-Klamath tribal organization without knowledge or consent of the Klamaths. In view of the history of these tribes as set out above, that assertion is not well founded. On the contrary, the Klamath River Tribe was never merged with nor absorbed into the

Hoopa Valley Tribe. Therefore, the action by which the Hoopa Valley Tribe limited the scope of its jurisdiction under its 1949 constitution does the Klamath River Indians no injustice.

The Hoopa Indians have actively attempted for more than half a century to preserve their interests in the Hoopa Valley Reservation and to keep the Klamath River Indians, and any others, from acquiring any tribal right in the area of the original 12-mile square. There is nothing in the records to indicate a recession from the position they held before Klamath River lands were annexed to the Hoopa Valley Reservation. A study of the various actions taken in connection with the allotment of land on the reservations discloses the active resistance of the Hoopa Tribe to the encroachment and claims of other tribes and other Indians. At a time when a number of outsiders were attempting to obtain allotments at Hoopa Valley, the tribal council, anxious to preserve the reservation for Indians of the Hoopa Tribe, stated in a letter dated June 19, 1916, to the Commissioner of Indian Affairs:

There are certain tribes that are regarded as having tribal rights on the Hoopa reservation. This we cannot understand. Take the Klamath for instance—they represent a different tribe, talk a different language, and have never associated with the Hoopas to amount to anything. As near as we can understand the Hoopa and Klamath River reservation were allotted twenty some odd years ago. The Klamath are today enjoying the rights of their allotments, own their lands and homes. While the Hoopas have had their land resurveyed and are now waiting to receive their allotments and are still uncertain about our land, and still they say we are linked with the other tribes—surely there must be a mistake somewhere * * *.

In reply, the Indian Bureau stated that only those persons enrolled as Indians on the Hoopa Valley Reservation or voluntarily adopted by the tribal business committee could be granted "any benefits whatever as Indians of the Hoopa Valley Reservation."⁴ Allotment rolls for Hoopa Valley were closed in 1923, but were subsequently reopened when other surveys were subsequently made in 1929 and 1933.

In May of 1932, the Superintendent wrote to the Commissioner requesting definite instructions for the allotting of the Hoopa Valley. At that time about 175 selections of land for allotment had been on file at the agency for a period of nearly 5 years, and many Indians were in possession of definite tracts and had improved such lands. With respect to the situation on the reservation, the Superintendent made this observation:

The Office should understand that the great majority of these Indians feel that the Klamath and the Hoopa countries are separate and distinct and there is no fixed desire on the part of the Hoopas to take over any unallotted Klamath lands, and the great majority of the Klamaths have no desire to come in and take over Hoopa country. I am not unmindful of previous statements that have

⁴Letter from Chief Clerk, Indian Bureau, to Superintendent, Hoopa Valley School, July 17, 1916.

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been made to me by the Office to the effect that it is considered by the Office as one reservation only.

The reply to this letter announced that a representative of the Commissioner was on his way to the reservation and would "go over the situation * * * on the ground."⁵

Shortly thereafter, special allotting agent Charles E. Roblin was sent to Hoopa Valley to study the matter and report his views. The Roblin report, dated November 19, 1932, recommended that further allotments be authorized on the Hoopa Valley Reservation but that such allotments be limited to the agricultural lands, with the right to such allotments given only to those who had already occupied and improved these lands for beneficial use. Two months later, in a supplemental report, Agent Roblin withdrew his recommendation that actual use be a condition precedent to allotment and recommended that claimants whose selections covered surveyed lands have their selections confirmed, provided that the individual's enrollment on the Hoopa Valley Agency rolls was regular and that he was entitled to allotment. Roblin further stated that among the Indians, a sentiment of urgency prevailed "based largely on a desire of the Hoopa Indians to exclude the Klamath River and Lower Klamath Indians from allotment on the original Hoopa Valley Reservation." It was Roblin's opinion "that the objection to the rights of these claimants *as a class*, should be disregarded." The Commissioner agreed that Indians from the "Connecting Strip" and the former Klamath River Reservation should be allotted equally with those already living on the original Hoopa Valley Reservation, but conceded that there was not sufficient available land to allot all these Indians thereon. Therefore, he approved only the allotment schedules which had been previously submitted by the Hoopa Tribal Council in 1921 stating, "after the schedules referred to above, no further allotments at Hoopa Valley will be made at this time." All unallotted lands were then held for tribal use under a proposed Indian Reorganization Act.

Subsequently, on November 20, 1933, the Commissioner of Indian Affairs approved a constitution and bylaws of the Hoopa Business Council which provided in part:

Article III. The business council shall be composed of seven enrolled members of the Hoopa tribe; bona fide residents of Humboldt County, California; and twenty-one years of age or over.

The council represented only the Indians of the 12-mile square Hoopa proper. The Klamath River Extension was not represented on this council, and has not been represented there since.

As a result of the enactment of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 986), a question arose as to whether a

⁵ Letter to Superintendent from Assistant Commissioner, dated September 16, 1932.

single referendum should be held on the enlarged Hoopa reservation; or whether separate elections should be held on the two areas permitting each section to determine its own destiny. On October 20, 1934, Commissioner John Collier communicated his decision to Mr. Roy Nash, District Coordinator for Reorganization Act in a letter containing the following sanction:

Superintendent Boggess is authorized to hold two separate elections on the Hoopa Valley Reservation, one of them on Hoopa Valley proper for the Hoopa, and another election on the territory occupied by the Klamath Indians, when the Secretary calls such election.

The records further show that on December 15, 1934, the Indians on the Hoopa Valley Reservation voted to make the Indian Reorganization Act inapplicable on that reservation. The Klamath River Indians also opposed the application of the act to lands occupied by themselves. Thus, in two separate elections, which might have resulted in more closely tying the extension lands with the original 12-mile square area, both the Hoopa Indians and the Klamath River Indians defeated the reorganization measure. The total of votes for each of these tribes is recorded separately.⁶

Inasmuch as the Indian Reorganization Act provided a method of uniting the Hoopa and Klamath River tribes, and both tribes rejected such a plan, these groups remain and must be recognized as independent tribal groups until such time as they affirmatively and voluntarily form a consolidated governmental body having jurisdiction over the entire reservation. Such a confederation or consolidation has not taken place.

In summary, it is our opinion that the contentions on behalf of the Yurok Indians have not been substantiated, and that the Bureau of Indian Affairs has properly carried out its responsibilities in the premises. In reply to your specific questions, no Indians other than those enrolled as members of the Hoopa Tribe of the original 12-mile square reservation and their descendants, have rights of participation in the communal property on that part of the Hoopa Valley Reservation.

The Indian inhabitants of the Hoopa extension and the other areas outside the jurisdiction of the Hoopa Valley Tribe may associate as a separate Indian tribe, or tribes, under constitutions acceptable to them and to the Bureau of Indian Affairs. But no such association can work to vest such Indians with an interest in the Hoopa Valley proper.

EDMUND T. FRITZ,
Deputy Solicitor.

⁶ Haas, "Ten Years of Tribal Government Under I. R. A.," U. S. Indian Service, 1947, p. 14.

Appendix I
CONSTITUTION AND BYLAWS
OF THE
HOOPA VALLEY TRIBE
IN
CALIFORNIA
PREAMBLE

We, the members of the Hoopa Valley Tribe in California, in order to exercise our tribal rights and promote our common welfare do hereby ordain and establish this Constitution and By-laws.

ARTICLE I—PURPOSE

The purpose shall be to protect and promote the interests of the Hoopa Valley Indians, to develop cooperative relations with the agencies of the Federal Government and to cooperate with State and local governments.

ARTICLE II—NAME

This tribal organization shall be called "The Hoopa Valley Tribe."

ARTICLE III—TERRITORY

The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians of California.

ARTICLE IV—MEMBERSHIP

Section 1. The membership of the Hoopa Valley Tribe shall consist as follows:

- (a) All persons of Hoopa Indian blood whose names appear on the official roll of the Hoopa Valley Tribe as of October 1, 1949; provided that corrections may be made in the said roll by the Business Council within five years from the adoption and approval of this Constitution, subject to the approval of the Secretary of the Interior or his authorized representative.
- (b) All children, born to members of the Hoopa Valley Tribe, who are at least one-quarter degree Indian blood.

Section 2. The Business Council shall have the power to make rules governing the adoption of new members or the termination of membership in the tribe.

ARTICLE V—GOVERNING BODY

Section 1. The governing body of the Hoopa Valley Indians of the Hoopa Valley Reservation shall be a council known as the Hoopa Valley Business Council.

Section 2. The business council shall consist of seven councilmen to be elected from the districts as set forth hereafter.

Section 3. The representation from the districts hereby designated shall be as follows: Hostler and Matilton Districts, one councilman; Soctish and Chenone Districts, one councilman; Agency District, Norton District, Campbell District, Bald Hill District, and Mesket District, one councilman each.

Section 4. The business council shall have the power to change the districts and the representation from each district based upon community organization or otherwise, as deemed advisable, such change to be made by ordinance, but the total number of councilmen shall not be changed, as provided for in Section 2 of Article V of this Constitution.

Section 5. The business council so organized shall elect from within its own number (1) a chairman and (2) a vice chairman, and from within or without its own membership (3) a secretary, and (4) a treasurer, and may appoint or employ from within or without its own membership such other officers and committees as may be deemed necessary.

Section 6. No person shall be a candidate for membership in the business council unless he shall be a member of the Hoopa Valley Tribe of the Hoopa Valley Reservation, and shall have resided in the district of his candidacy for a period of one year next preceding the election and be at least 21 years of age.

Section 7. The business council of the Hoopa Valley Tribe of the Hoopa Valley Reservation shall be the sole judge of the qualifications of its members.

ARTICLE VI—NOMINATIONS AND ELECTIONS

Section 1. The first election of business council under this constitution shall be called, held, and supervised by the present business Council within 30 days after the ratification and approval of this constitution. At the first election, the candidate receiving the highest number of votes in the Mesket, Campbell, and Norton Districts shall serve 2 years. The candidates receiving the highest number of votes in the Bald Hill District, Agency District, the Soctish and Chenone Districts, the Hostler and Matilton Districts shall serve 1 year; and thereafter elections for the business council shall be held every year and shall be called at least 60 days prior to the expiration of terms of office. The term of office of a councilman shall be for a period of 2 years unless otherwise provided herein.

Section 2. The candidate receiving the greatest number of votes in his district shall be designated as the "councilman" to serve as stipulated in the preceding section; the candidate receiving the second greatest number of votes in his district shall be designated as "first subcouncilman" and may participate and vote in council meetings if the "councilman" is absent; and the candidate receiving the third greatest number of votes in his district shall be designated as "second subcouncilman," and may participate and vote in council meetings from which both the "councilman" and the "first subcouncilman" are absent. The terms of office for subcouncilman shall coincide with the terms stipulated for the councilman.

Section 3. The business council, or an election board appointed by the council, shall determine rules and regulations governing all elections.

Section 4. All elections shall be by secret ballot.

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Section 5. Any qualified member of the Hoopa Valley Tribe may announce his or her candidacy for the business council within the district of his or her residence by petition signed by not less than 5 legal voters. A voter may sign only one petition. Petitions for nomination shall be filed with the secretary of the business council at least 10 days prior to the election for which the candidate makes his or her petition. It shall be the duty of the secretary to post in a public place and in at least one place in the district affected, at least one week before the election the names of all candidates for the business council who have met those requirements.

Section 6. The business council or a board appointed by the business council shall certify to the election of the members of the business council within 5 days after the election returns.

Section 7. Each member of the business council and each officer or subordinate officer, elected or appointed hereunder, shall take an oath of office prior to assuming the duties thereof, by which oath he shall pledge himself to support and defend the Constitution of the United States and this constitution and bylaws. The following form of oath of office shall be given: "I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies; that I will carry out faithfully and impartially the duties of my office to the best of my ability; that I will promote and protect the best interests of my tribe, in accordance with this constitution and bylaws."

Section 8. Any member of the Hoopa Valley Tribe of the Hoopa Valley Reservation who is 21 years of age or over, and who has maintained legal residence for at least six months on the Hoopa Valley Reservation shall be entitled to vote.

Section 9. The business council or a board appointed by the business council shall designate the polling places and appoint all election officials.

ARTICLE VII—VACANCIES AND REMOVAL FROM OFFICE

Section 1. If a councilman or official shall die, resign, be removed or recalled from office, permanently leave the reservation, or shall be found guilty of a felony or misdemeanor by involving dishonesty in any Indian, State, or Federal Court, the business council shall declare the position vacant. The first subcouncilman in the district affected shall fill the unexpired term. In the absence of a first subcouncilman the second subcouncilman shall fill the unexpired term. In the absence of any subcouncilman the district affected shall elect to fill the unexpired term.

Section 2. The business council may by four affirmative votes expel any member for neglect of duty or gross misconduct. Before any vote for expulsion is taken on the matter, such member or official shall be given a written statement of the charges against him at least 5 days before the meeting of the business council before which he is to appear, and an opportunity to answer any and all charges at such designated council meeting. The decision of the business council shall be final.

Section 3. Upon receipt of a petition signed by one-third of the eligible voters in any district calling for the recall of any member of the Council, representing said district, it shall be the duty of the council

to call an election on such recall petition. No member may be recalled in any such election unless at least 30 percent of the legal voters of the district shall vote at such election.

ARTICLE VIII—POWERS AND DUTIES OF BUSINESS COUNCIL

Section 1. The business council shall have the following powers: subject to any limitations imposed by Federal Statutes or by the Constitution of the United States:

(a) To administer all tribal property by ordinance or resolution subject to the approval of the Commissioner of Indian Affairs or his authorized representative;

(b) To borrow money, subject to the approval of the Commissioner of Indian Affairs, from the Indian credit fund or from any other Federal or State agency, and to pledge or assign future tribal income as security for such loans;

(c) To collect and expend any Hoopa Valley tribal funds within the exclusive control of the tribe and to recommend the expenditure of any other tribal funds;

(d) To purchase in the name of the Hoopa Valley Tribe any land or other property the Council may deem beneficial to said Hoopa Valley Indians;

(e) To enforce approved regulations for the protection of tribal property, wild life, and natural resources of the Hoopa Valley Indians;

(f) 1. To provide assessments or license fees upon nonmembers doing business or obtaining special privileges within the reservation subject to the approval of the Commissioner of Indian Affairs or his authorized representative,

2. To promulgate and enforce assessments or license fees upon members exercising special privileges or profiting from the general resources of the reservation,

(g) To negotiate with the Federal, State, and local governments on behalf of the tribe;

(h) To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the tribe and of the Commissioner of Indian Affairs;

(i) To prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets;

(j) To exclude from the restricted land of the Hoopa Valley Indian Reservation persons not legally entitled to reside therein, under ordinances which shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative;

(k) To promulgate and enforce ordinances which shall be subject to the approval of the Commissioner of Indian Affairs, governing the conduct of members of the Hoopa Valley Indians;

(l) To safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting nonmembers of the Hoopa Valley Indians shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative;

(m) To confer with the Commissioner of Indian Affairs and the representatives of his Bureau upon all appropriation estimates and budgets for the benefit of the tribe prior to their submission to the Bureau of the Budget and Congress;

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(n) To establish a tribal court through the necessary ordinances and resolutions until State law and order jurisdiction is extended to the Hoopa Reservation.

Section 2. Any rights and powers heretofore vested in the Hoopa Valley Tribe but not expressly referred to in this constitution shall not be abridged, but may be exercised by the members of the Hoopa Valley Tribe through the adoption of appropriate bylaws and constitutional amendments.

Section 3. The business council of the Hoopa Valley Tribe may exercise such further powers as may in the future be delegated by any duly authorized official or agency of the Federal or State Government or by the members of the tribe.

ARTICLE IX—AMENDMENTS

Section 1. Amendments to the constitution and bylaws may be ratified and approved in the same manner as this constitution and bylaws. Whenever the business council shall, by a vote of five or more members, call for the submission of an amendment, the business council shall call an election upon the proposed amendment. If at such election, the amendment is adopted by a majority of the qualified voters of the tribes voting thereon and if at least 30 percent of those entitled to vote shall vote in such election, such amendment shall be submitted to the Commissioner of Indian Affairs and, if approved by him, shall thereupon take effect.

ARTICLE X—ELIMINATION OF APPROVAL

Section 1. The Hoopa Valley Tribe may request the elimination of the requirement of approval of the Secretary of the Interior, the Commissioner of Indian Affairs, or his authorized representative, at the expiration of five years from the date of the approval of this constitution and bylaws.

BYLAWS OF THE HOOPA VALLEY INDIANS

BUSINESS COUNCIL

ARTICLE I

SECTION 1. THE CHAIRMAN OF THE BUSINESS COUNCIL

The Chairman of the business council shall preside over all meetings of the Council and of the tribe. He shall perform all duties of the Chairman and exercise any authority delegated to him by the business council.

SECTION 2. VICE-CHAIRMAN OF THE BUSINESS COUNCIL

The Vice-Chairman of the business council shall assist the Chairman when called upon to do so. In the absence of the Chairman, he shall preside, and when so presiding shall have all the rights, privileges and duties, as well as the responsibilities of the Chairman.

SECTION 3. SECRETARY OF THE BUSINESS COUNCIL

The Secretary of the Business Council shall conduct all correspondence and keep a complete and accurate record of all matters transacted at Council and Committee meetings. It shall be his duty to submit promptly to the Superintendent of the jurisdiction and to the Commissioner of Indian Affairs copies of all minutes of regular and special meetings of the Business Council and the tribes.

SECTION 4. TREASURER OF THE BUSINESS COUNCIL

The Treasurer of the Business Council shall be the custodian of all moneys which may come into the control of the business council. He shall pay out money in accordance with ordinances and resolutions of the business council. He shall keep an account of all receipts and disbursements, and shall report same to the business council at each regular meeting. He shall be bonded in such an amount as the business council may by resolution provide, approved by the Commissioner of Indian Affairs. The books of the Council Treasurer shall be subject to audit or inspection at the direction of the business council or the Commissioner of Indian Affairs. The California Indian Agency shall be responsible for the custody and disbursement of tribal funds until the Treasurer obtains an adequate bond.

SECTION 5. APPOINTIVE OFFICERS

The duties of all appointive committees and officers appointed by the business council shall be clearly defined by resolution of the business council at the time of their creation or appointment. Such committees or officers shall report from time to time, as required, to the business council, and their activities and decisions shall be subject to review by the business council upon the petition of any person aggrieved.

TIME AND PLACE OF MEETINGS AND PROCEDURE

ARTICLE II

Section 1. Regular meetings of the business council shall be held on the first Thursday of each month in a hall designated by the business council.

Special meetings may be called by written notice signed by the Chairman, or by a petition signed by four council members, and when so called, the business council shall have power to transact business as in regular meetings.

Section 2. No business shall be transacted unless a quorum is present.

A quorum shall consist of five councilmen.

Section 3. The following order of business is established for all meetings.

1. Call to order by Chairman.
2. Roll call.
3. Ascertainment of a quorum.
4. Reading of the minutes of the last meeting.
5. Adoption of minutes by a vote or common consent.
6. Unfinished business.
7. New business.
8. Adjournment.

Section 4. Report of Meetings. It shall be the duty of each member of the business council to make reports concerning the proceedings of the business council to the members of the district from which he is elected.

Section 5. Salaries. The business council may prescribe by resolution such salaries for officers, committees, or members of the council as it deems advisable from such funds as may be available.

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ARTICLE III—RATIFICATION OF CONSTITUTION AND BYLAWS

This constitution and bylaws shall be in full force and effect whenever a majority of the adult voters of the Hoopa Valley Indian Tribe voting in an election called by the Business Council, in which at least 30 percent of the eligible voters vote, shall have ratified such constitution and bylaws, and the Commissioner of Indian Affairs shall have approved same.

THE TEXAS COMPANY

A-27385

A-27404

A-27405

*Decided February 12, 1958***Outer Continental Shelf Lands Act: State Leases: Recognition of**

The Secretary of the Interior has final administrative authority to determine under the provisions of the Outer Continental Shelf Lands Act whether a State lease offered for validation covers submerged lands of the outer Continental Shelf.

Outer Continental Shelf Lands Act: State Leases: Recognition of

The fact that an applicant for validation of a State lease files a certificate pursuant to section 6 (a) (3) (A) of the Outer Continental Shelf Lands Act does not limit the authority of the Secretary to make his own determination under section 6 (a) (2) of the act.

Outer Continental Shelf Lands Act: Boundaries

In deciding applications of State lessees for validation of leases in disputed offshore areas, the Secretary of the Interior will adhere to the position taken by the Attorney General in current litigation of issues relating to the location of seaward boundaries of the lessor State.

Outer Continental Shelf Lands Act: Administrative Construction

Applications for validation of State leases purportedly covering outer Continental Shelf Lands must be considered in the light of the clear wording of the acts of Congress establishing an equitable basis for approval of such applications by the Secretary of the Interior, as well as the general import of the submerged lands decisions of the United States Supreme Court.

Outer Continental Shelf Lands Act: Generally

The validation provisions of the Outer Continental Shelf Lands Act, when read in conjunction with the Submerged Lands Act, effectuate the legislative objective of protecting equitable interests of persons or companies holding State-issued leases, and the intent of the parties to such leases will be given proper weight in determining whether such leases cover outer Continental Shelf lands.

Outer Continental Shelf Lands Act: Boundaries

Where a State lease issued in 1936 purports to cover lands "to the extreme limit * * * of the domain, territory and sovereignty" of the State, it will be construed as intended to apply to all lands historically claimed by the State for purposes of validation under the Outer Continental Shelf Lands Act.

Outer Continental Shelf Lands Act: State Leases: Generally

Where a State lease is ambiguous as to extent, such lease for the purposes of validation will not be construed as including lands in the Gulf of Mexico beyond a line 3 marine leagues from the shoreline, inasmuch as Congress rejected State claims beyond that line in enacting the Submerged Lands Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Texas Company has appealed to the Secretary of the Interior from three decisions dated May 15, August 1, and August 2, 1956, respectively, of the Director or Acting Director of the Bureau of Land Management, each of which rejected an application filed by Texas pursuant to section 6 of the Outer Continental Shelf Lands Act (43 U. S. C., 1952 ed., Supp. IV, sec. 1335).

Each application covers an area of submerged lands in the Gulf of Mexico which The Texas Company says was included within State of Louisiana Mineral Lease No. 340, issued by the Governor of Louisiana to William T. Burton on February 7, 1936, and shortly thereafter assigned to the appellant.

As originally issued, the lease covered, along with other areas not here material, the following:

All of the property now or formerly constituting the beds and other bottoms of lagoons, lakes, gulfs, bays, coves, sounds, inlets and other water bodies, and also all islands and other lands *belonging to the State of Louisiana* and not under lease from the State on the date of application, namely, Jan. 8th, 1936, and being situated or included within the following described boundaries:

Beginning on the mean high water line at the most westerly tip of Terrebonne Parish, La., known as Pointe au Fer, and running along said mean high water line as it follows the shores of Atchafalaya Bay, Four League Bay, East Bay, Morrison's Cut-off, Bayou Sale Bay, East Cote Blanche Bay, West Cote Blanche Bay, Jaws or Little Bay, Vermilion Bay, Weeks Bay, and of all lagoons, lakes, bays, coves, sounds, inlets, and other water bodies adjoining or forming arms of said named bays, excluding, however, all rivers, creeks, streams or bayous, tributary thereto, said mean high water line, with the exception of that part bordering Four League Bay or arms thereof, following the shores of Terrebonne, St. Mary, Iberia, and Vermilion Parishes, to the most eastern point on that promontory of land forming the west side of Southwest Pass; thence in a general westerly direction along the shore of the Gulf of Mexico to the dividing line between Cameron and Vermilion Parishes; *thence south along said dividing line into the marginal or maritime belt of the Gulf of Mexico to the extreme limit or boundary of the domain, territory, and sovereignty of the State of Louisiana*; thence easterly along said limit or boundary to a point due south of place of beginning; thence north to place of beginning, *including in particular the beds and bottoms of Vermilion Bay, Weeks Bay, West Cote Blanche Bay, Jaws or Little Bay, East Cote Blanche Bay, Bayou Sale Bay, Morrison's Cut-Off, East Bay, Atchafalaya Bay and Four League Bay, Southwest Pass and part of the Gulf of Mexico*; this particularization, however, not being or intended to be all-inclusive.

LESS AND EXCEPT MARSH ISLAND and the beds and bottoms underlying the following three described tracts:

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Tract #1/ That part of Vermilion Bay lying in the N½ of T. 15 S., R. 3 E., La. Mer.

Tract #2/ That part of Vermilion Bay lying in Iberia Parish.

Tract #3/ That part of Bayou Sale Bay and East Cote Blanche Bay bounded as follows:

On the east and south by the shore line of St. Mary Parish, on the north by the north line of Township 17 South—Range 9 East, Louisiana Meridian, and on the west by a line running due north from Pt. Chevreuil to the north line of said township.

All of the above described property lying within the Parishes of Vermilion, Iberia, St. Mary, and Terrebonne, State of Louisiana. [Italics added.]

It further appears that on November 18, 1943, The Texas Company and the State Mineral Board entered into an agreement whereby the lessee relinquished certain areas covered by the lease and retained 12 areas described in the agreement. Three of these areas are involved here, one in each of the applications. Application 0310 covers the South Marsh Island Prospect, 0311 the Southwest Marsh Island Prospect, and 0331 the Rabbit Island Dome Area. The complete descriptions in the agreement of the three tracts are as follows:

I—SOUTH MARSH ISLAND PROSPECT

All of the property now or formerly constituting the beds and other bottoms of lagoons, lakes, gulfs, bays, coves, sounds, inlets and other water bodies, and also all islands and other lands belonging to the State of Louisiana, *and covered by State Mineral Lease No. 340*, and being situated or included within the following described boundaries:

BEGINNING at a point in the South shore line of Marsh Island which is 6900 feet West of a North and South line drawn through U. S. Coast and Geodetic Survey Triangulation Station "LA CROIX" 1933 (Station Latitude 29 degrees 32 minutes 17.947 seconds, and Longitude 91 degrees 57 minutes 23.461 seconds, North American Datum of 1927); THENCE South *into the marginal or maritime belt of the Gulf of Mexico to the extreme limit or boundary of the domain, territory and sovereignty of the State of Louisiana*;

THENCE Easterly *along said limit or boundary* to a point which is 32,900 feet East of a North and South line drawn through said Station "LA CROIX"; THENCE North *through the Gulf of Mexico* to the South shore of Marsh Island;

THENCE Westerly following on and along the shore of Marsh Island and the boundary of State Mineral Lease No. 340 to the place of beginning. (Article X, p. 21; italics supplied.)

II—SOUTHWEST MARSH ISLAND PROSPECT

All of the property now or formerly constituting the beds and other bottoms of lagoons, lakes, gulfs, bays, coves, sounds, inlets and other water bodies, and also all islands and other lands belonging to the State of Louisiana, *and covered by State Mineral Lease No. 340*, and being situated or included within the following described boundaries:

BEGINNING at a point in the South shore line of Marsh Island, which is 6900 feet West of a North and South line drawn through U. S. Coast

and Geodetic Survey Triangulation Station "LA CROIX" 1933 (Station Latitude 29 degrees 32 minutes 17.947 seconds, and Longitude 91 degrees 57 minutes 23.461 seconds, North American Datum of 1927) which point is also the Northwest corner of the South Marsh Island Prospect hereinabove described;

THENCE South into the marginal or maritime belt of the Gulf of Mexico following on and along the West boundary of the South Marsh Island Prospect hereinabove described, to the extreme limit or boundary of the domain, territory and sovereignty of the State of Louisiana;

THENCE Westerly along said limit or boundary to a point which is 58,000 feet West of a North and South line drawn through the Northeast corner of the Southwest Marsh Island Prospect;

THENCE North through the Gulf of Mexico to the South shore of Vermillion Parish and the North boundary of State Mineral Lease No. 340;

THENCE Easterly following on and along the South shore of Vermillion Parish and on the North boundary of State Mineral Lease No. 340, crossing Southwest Pass and continuing Southeasterly to the place of beginning. (Article XI, p. 23; italics supplied.)

III—RABBIT ISLAND DOME AREA

All of the property now or formerly constituting the beds and other bottoms of lagoons, lakes, gulfs, bays, coves, sounds, inlets and other water bodies, and also all islands and other lands belonging to the State of Louisiana, and covered by State Mineral Lease No. 340, and being situated or included within the following described boundaries:

BEGINNING at a point which is 21,120 feet East of a concrete monument set on a shell reef in Atchafalaya Bay, said monument being located South 2 degrees 05 minutes 11 seconds East 29,819 feet from U. S. Coast and Geodetic Survey Triangulation Station "ISLAND" 1933 (Station Latitude 29 degrees 30 minutes 31.433 seconds, and Longitude 91 degrees 36 minutes 00.428 seconds, North American Datum of 1927);

THENCE South from the point of beginning 21,120 feet;

THENCE West 42,240 feet;

THENCE North 42,240 feet;

THENCE East 42,240 feet;

THENCE South 21,120 feet to the point of beginning. (Article IV, pp. 10-11; italics supplied.)

The agreement referred to and incorporated maps attached to it as exhibits which showed the selected areas. The Rabbit Island Dome Area map (Exhibit "D") depicts an area, bounded on all sides, in accordance with the metes and bounds description. The South and Southwest Marsh Island Prospects map (Exhibit "G") shows the north line of each area and the east and west lines extending southward to the end of the map, but does not show the end of these lines or the south boundary. On each side of the north-south line dividing these two areas, the map contains the legend "South to the Boundary of State Mineral Lease No. 340." According to the scale on which the map is drawn, the areas covered extend from more than 3 leagues to 17 miles from the shore, which is the northern boundary of the two areas.

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The authority of the State of Louisiana to issue so much of lease No. 340 and other leases as covered water bottoms in the Gulf of Mexico was involved in *United States v. Louisiana*, 339 U. S. 699 (1950). There the Court held that the United States, and not Louisiana, had paramount rights in and full dominion and power over the area lying seaward of the ordinary low watermark on the coast of Louisiana and outside of the inland waters and enjoined Louisiana and all persons claiming under it from trespassing on this area in violation of the rights of the United States. This decision and the decree entered to carry it into effect (340 U. S. 899 (1950)) prevented lessees of Louisiana, such as The Texas Company, from exercising any rights under their State leases in that area.

However, by the Submerged Lands Act of May 22, 1953 (43 U. S. C., 1952 ed., Supp. IV, sec. 1301 *et seq.*), the United States relinquished and released generally to the affected States all its right, title and interest to the lands beneath navigable waters for a distance of 3 geographical miles from the coast line or to the boundary of a State as it existed at the time such State became a member of the Union, but in no event could a boundary be interpreted as extending from the coast line more than 3 marine leagues into the Gulf of Mexico. But this legislative grant was not necessarily determinative of State boundaries.

Three months later the Congress enacted the Outer Continental Shelf Lands Act of August 7, 1953 (43 U. S. C., 1952 ed., Supp. IV, sec. 1331 *et seq.*), in which it declared it " * * * to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition * * * " (id., sec. 1332 (a)). The term "outer Continental Shelf" is defined as meaning all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in the Submerged Lands Act (*supra*).

Section 6 of the Outer Continental Shelf Lands Act provides for the validation and maintenance under certain conditions by the lessees of leases issued by a State insofar as they cover submerged lands of the outer Continental Shelf. Subsection (a) sets forth 11 requirements that must be met before a lease can be validated. It is under section 6 that the appellant contends it is entitled to a validation of its lease as to so much of each of the three tracts as fall within the scope of the Outer Continental Shelf Lands Act. The remaining areas covered by its lease, which apparently underlie either the inland waters of Louisiana or the area affected by the Submerged Lands Act, are not involved in this proceeding.

However, it is by no means clear just what areas are physically involved. This difficulty stems from the fact that none of the points of reference has as yet been fixed. There is at this moment pending

before the United States Supreme Court the case of *United States v. Louisiana* (No. 11 Orig., 1956 Term), a proceeding to determine whether the Submerged Lands Act granted Louisiana the lands and resources under navigable waters extending into the Gulf of Mexico to the extent of 3 marine leagues (or 9 geographical miles). If this issue is decided in favor of Louisiana, it obviously would remove a large area from this dispute. There would still, however, remain the problem of ascertaining the baseline from which the 9-mile belt is to be measured. The farther southward this line is set, the smaller becomes the possible area as to which validation would be necessary.

Alternative locations for this line vary from the so-called Chapman line, which in the area covered by the Marsh Island Prospects approximates their northern boundary, to the line set by the Louisiana Legislature in Act. No. 33 of 1954 (LSA-R.S., 1956 Supp., 49:1), which adopts a line roughly 10-15 miles farther seaward as the coastline of the State and places the State boundary 3 marine leagues south of that line. If the latter line is adopted as the boundary of Louisiana, which seems unlikely, still more of the area in dispute would be removed from these applications.

Although it is conceivable that the southward extent of the two Marsh Island Prospects could vary with the several possible combinations of coastline and marginal belt, The Texas Company has given some degree of definitiveness to the areas involved in these appeals by claiming only that the southern boundaries of the two prospects lie 27 miles out in the Gulf from the shore of Marsh Island and the adjacent mainland (Brief of The Texas Company on Appeal from the Bureau of Land Management, p. 30), which is the State boundary established by Louisiana Act No. 55 of 1938 (LSA-R. S. 49:1).

The Director and Acting Director, respectively, rejected each of the applications in its entirety and The Texas Company has duly taken these appeals.

There appears to be no dispute as to whether The Texas Company has complied with the procedural and technical requirements of section 6 (a). The primary issue is whether lease No. 340, with respect to the three areas involved, covered any of the submerged lands affected by the Outer Continental Shelf Lands Act. A subsidiary issue is who is to make this determination as to coverage.

The decisions below have erroneously held that lease No. 340 did not extend beyond the low watermark on the shore of the State. The Texas Company extravagantly contends that lease No. 340, as interpreted by the 1943 agreement, ran to the 27-mile line, and that it is for the State Mineral Board to determine its coverage. Under the Bureau decisions, had they been affirmed, there was obviously nothing to validate under section 6.

Both the Bureau decisions and the appellant seem to consider that

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the question as to the coverage of lease No. 340 and as to who is to determine the coverage is somehow bound up in paragraph (2) of subsection (a) of section 6. I think this is a misconception. The pertinent provisions of section 6 are as follows:

(a) The provisions of this section shall apply to any mineral lease *covering submerged lands of the outer Continental Shelf* issued by any State (including any extension, renewal, or replacement thereof heretofore granted pursuant to such lease or under the laws of such State) if—

(2) *such lease* was issued prior to December 21, 1948, and would have been on June 5, 1950, in force and effect in accordance with its terms and provisions and the law of the State issuing it had the State had authority to issue *such lease*;

(3) there is filed with the Secretary, within the period or periods specified in paragraph (1) of this subsection, (A) a certificate issued by the State official or agency having jurisdiction over *such lease* stating that it would have been in force and effect as required by the provisions of paragraph (2) of this subsection, or (B) in the absence of such certificate, evidence in the form of affidavits, receipts, canceled checks, or other documents that may be required by the Secretary, sufficient to prove that *such lease* would have been so in force and effect;

(b) Any person holding a mineral lease, which *as determined by the Secretary* meets the requirements of subsection (a) of this section, may continue to maintain such lease * * *. (43 U. S. C., 1952 ed., Supp. IV, sec. 1335; italics added.)

Subsection (a) plainly states that section 6 shall apply to any lease "covering submerged lands of the outer Continental Shelf," if, among other conditions, "such lease" would have been in force and effect on June 5, 1950. The phrase "such lease" in paragraph (2) can relate back only to the antecedent phrase "any mineral lease covering submerged lands," etc. If the antecedent phrase were interpolated in paragraph (2), subsection (a) would read as follows:

(a) The provisions of this section shall apply to any mineral lease covering submerged lands of the outer Continental Shelf issued by any State * * * if—

(2) [this] * * * lease [covering submerged lands of the outer Continental Shelf] was issued prior to December 21, 1948, and would have been on June 5, 1950, in force and effect in accordance with its terms and provisions and the law of the State issuing it *had the State had authority to issue* * * * [this] lease [covering submerged lands of the outer Continental Shelf]; [Emphasis supplied.]

Thus reading paragraph (2), it is inescapable that, whatever determination is to be made under that paragraph with respect to issuance of a lease and its existence on June 5, 1950, the determination is not to include any determination as to whether the lease covers any land in the outer Continental Shelf. The reason is that before paragraph (2) comes into play, it must already have been determined that the lease in question does cover land in the outer Continental Shelf. This conclusion is buttressed by the word "if" at the end of the first paragraph of section 6. The provisions of section 6 apply

to a lease covering land in the outer Shelf *if* certain conditions are met, including issuance before December 21, 1948, and existence on June 5, 1950. Obviously, before it becomes necessary to determine "if" the conditions have been met, it is first essential to determine whether the lease covers land in the outer Shelf. Otherwise the predicate for determining whether requirements (1) to (11) in paragraph (a) have been met would not exist.

Who then is to make the basic or final determination whether a lease sought to be validated embraces land in the outer Shelf? The answer is plainly stated in subsection (b) of section 6, that the Secretary of the Interior is to determine whether a lease meets the requirements of subsection (a). There is no necessity or reason therefore to speculate on the question.

Even in the absence of subsection (b), it is well established that where an act of Congress grants lands of a certain character, in the absence of a specific provision to the contrary, the determination of whether certain lands fall within the grant rests with the Secretary of the Interior. *Cameron v. United States*, 252 U. S. 450, 459-465 (1920); *West v. Standard Oil Company*, 278 U. S. 200, 211 (1929). Therefore, before any determination can be made as to whether an applicant has complied with requirements (1) to (11) of section 6 (a), the Secretary must first decide whether the lease offered for validation covers lands upon which he is authorized to act, i. e., lands in the outer Shelf.

Although it seems plain that determinations under section 6 as to whether land in a lease is situated in the outer Shelf do not fall within the ambit of paragraph (2) of subsection (a), if we assume for any reason that they do, the position of The Texas Company that the determinations are to be made by the State and that the State's determinations are conclusive is untenable.

Pursuant to the command of section 6, the appellant has, in each case, submitted a certificate from the proper State officials in which the Register of the State Land Office states in part:

That there is attached hereto a true copy of Louisiana State Oil, Gas, and Mining Lease No. 340, that said lease is under the jurisdiction of said Register for the purposes aforesaid [collection of rentals and royalties] and that said lease was issued prior to December 21, 1948, and would have been on June 5, 1950, in force and effect in accordance with its terms and provisions and the law of the State of Louisiana had said State had authority to issue said lease.

and in which the Secretary of the State Mineral Board states in part:

* * * that insofar as the records of said Board reflect the status of said lease as at June 5, 1950, said lease would have been, on said date, in force and effect in accordance with its terms and provisions and the law of the State of Louisiana had said state had authority to issue said lease.

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In addition, with application 0311 the appellant filed two additional certificates by these officials which recited the fact that lease No. 340 had been issued, what its original southern boundary had been, and the fact that an instrument of release and selection had been executed, dated November 18, 1943, that one of the retained areas under the instrument was the Southwest Marsh Island Prospect in the Gulf of Mexico up to 27 marine miles from the coast, and that after execution of the instrument the Louisiana State Mineral Board had never accepted any application to lease any portion of the lands between the east and west boundaries of the Southwest Marsh Island Prospect and within 27 miles of the coast for the reason that the area had been considered as embraced within State Lease No. 340, as amended by the agreement of November 18, 1943. A similar certificate was filed along with OCS 0310.

The appellant urges that these certificates establish that lease No. 340 was validly issued, that it is valid as to each of the parcels in question, that the certificates satisfy the requirements of section 6 (a) (3) (A), and that the latter having been complied with, the Secretary's duties under section 6 (a) (2) are merely ministerial, and he must, other objections being absent, validate the lease.

The decisions below held that the provisions of section 6 (a) (3) (A) and 6 (a) (2) are separate and distinct and that compliance with the former does not deprive the Secretary of any authority to make a determination under the latter.

As we have just seen, subsection (b) of section 6 specifically provides that the Secretary is to determine whether the requirements of subsection (a) have been met. These requirements clearly include paragraph (2).

The appellant also argues that to give the Secretary this discretion would involve him in problems of State law in which he has no special competence. A similar objection might be raised to several of the other provisions of section 6 (a). Section 6 (a) (6) and (7) require, respectively, a finding that the lease offered for validation was not obtained by fraud or by misrepresentation and that if it was issued on or after January 23, 1947, it was issued upon the basis of competitive bidding. Both of these requirements are matters within the competence of local officials. Yet, it is clear that the question of compliance with them is solely for the Secretary to determine. The appellant concedes that (Texas' brief, p. 34). Consequently, I believe that the matter of competence to decide is not germane to the question of authority to decide.

Similarly, the fact that under section 6 (a) (3) (B) the Secretary is authorized to make a determination in the absence of a certificate by the proper State official supports the conclusion that the Secretary has

discretion under 6 (a) (2) even though a certificate is filed. Section 6 (a) (3) (B) provides an alternative for use in case the required certificate is not forthcoming from the proper State official. If resort must be made to 6 (a) (3) (B), the Secretary must make all the determinations as to the minutiae of State law and regulations, of which the appellant says Congress intended to relieve the Secretary. Since presumably the certificate would be refused only in cases in which there was some conflict between the lessee and the State, the Secretary would be left with the resolution of only the more difficult cases. Thus, it is my conclusion that one of the determinations the Secretary must make is whether the lease in question is qualified under section 6 (a) (2). In reaching this decision, the Secretary may rely upon a certificate filed pursuant to section 6 (a) (3) (A), but he is not precluded from making any further investigation he considers necessary to determine whether the lease is qualified under section 6 (a) (2).

It follows then that whether the determination as to whether land in a State lease is situated in the outer Shelf comes within the purview of section 6 (a) (2) or, as we have seen, properly comes under section 6 (b), the determination is one to be made by the Secretary of the Interior, unbound by any conclusion of the State.

We now address ourselves to the determination as to whether the three areas in question or any portion of them cover submerged lands of the outer Continental Shelf.

Section 1 of the Outer Continental Shelf Lands Act defines the lands to which it pertains as follows:

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 2 of the Submerged Lands Act (Public Law 31, Eighty-third Congress, first session), and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control; 43 U. S. C., 1952 ed., Supp. IV, sec. 1331 (a).

Section 2 of the Submerged Lands Act (43 U. S. C., 1952 ed., Supp. IV, sec. 1301) in turn, so far as pertinent, reads:

When used in this Act—

(a) The term "lands beneath navigable waters" means—

* * * * *

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

* * * * *

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but

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in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; * * *.

These definitions exclude from the area under consideration at least the lands lying within 3 geographical miles of the coastline.

Whether lease No. 340 extends farther than the 3-mile line depends, first, upon the area it covered when issued in 1936 and, secondly, whether it was extended under the 1943 agreement which relinquished certain areas.

The Director and the appellant agree that the southern limit of the lease was the southern boundary of Louisiana. They disagree, however, as to the location of that boundary; the Director erroneously holding that it runs along the low watermark of the Gulf and the line dividing the inland waters from the open sea, while The Texas Company asserts that it was at least the 3-league line. Because the Submerged Lands Act has removed the area lying shoreward of the 3-mile line from the controversy, it is sufficient for the purposes of this appeal to consider whether or not the southern boundary of the State ran seaward of that line.

This matter has been very carefully considered by the Attorney General of the United States in connection with the current case of *United States v. Louisiana, supra*. In the presentation of the case, the Attorney General argues that Louisiana's southern boundary never extended more than 3 miles from the low watermark and from the limit of the inland waters along the coast. (Brief For The United States In Support Of Motion For Judgment, hereafter referred to as Brief * * * pp. 10-12, 32-81.)

The Secretary of the Interior is firmly bound, of course, not only by statutory limitations imposed by Congress but also by the official position taken by the Attorney General in currently litigating the issue of boundary limits before the United States Supreme Court on behalf of the entire Government of the United States and for the very purpose of assisting the Department of the Interior in the performance of its functions under the Outer Continental Shelf Lands Act. Basically, that position may be stated for the purposes of this decision as follows:

1. If the State of Louisiana received any maritime belt by implication at the time of admission, it was the 3-mile belt recognized by the United States as the maximum permitted by international law, but in any event the submerged lands and resources of the Gulf were not

attributes of State sovereignty and did not pass to the State of Louisiana. Brief * * * pp. 17, 32.

2. The submerged lands granted to the State of Louisiana, as defined in section 2(b) of the Submerged Lands Act, are those lying within the boundary as it existed when the State entered the Union, or as since approved by Congress, not extending, however, more than 3 marine leagues into the Gulf of Mexico. *Id.*, p. 27. The Attorney General argues, of course, that there can be no justification for construing the boundary described in Louisiana's Enabling Act as including 3 leagues of water and submerged lands. That is the basic legal question before the Supreme Court for decision and it is in that precise area that Congress made validation available, in order to serve equity, pending final determination of Louisiana's outer boundary. *Id.*, pp. 34-35.

Reading the two acts of Congress in context, and as an earnest attempt on the part of Congress to effect an equitable and harmonious disposition of leasing problems arising from the Tidelands decisions of the Supreme Court by executing its constitutional powers in such a way as to avoid injustices to States or persons acting pursuant to their permission (*United States v. California*, 332 U. S. 19, 40 (1947)), it seems clear that the objectives can best be attained by holding that any validation in this instance shall be strictly limited to those lands covered by the leases lying beyond the 3-mile limit but extending in no instance beyond 3 marine leagues from the line of ordinary low water as stipulated by law. Accordingly, the position of the United States in the current litigation of *United States v. Louisiana*, No. 11 Original, 1956 Term, will be adhered to by this Department to the extent that any validation of these leases in offshore waters adjacent to Louisiana must be limited to lands lying beyond the 3-mile limit and within the 3 marine league limit provided in the Submerged Lands Act.

By Act No. 55 of 1938, Louisiana purported to extend its boundaries to a line 24 miles from the 3-mile line. The appellant seems to contend that the 1943 agreement between it and the State Mineral Board enlarged the acreage of its lease and this contention should be examined though it has little validity in view of what already has been said.

I say "seems to contend" because the appellant's position on this point is difficult to comprehend. Throughout its brief Texas seems to state that until 1938 the State took the position that its seaward boundary extended at least 3 leagues from the coast (pp. 1, 14-22, 60). Texas says "at least" 3 leagues but nowhere does it assert flatly that the seaward boundary did extend beyond the 3-league line and up to 27 miles. It would be nigh impossible for Texas to take this position in the face of Act No. 55 of 1938 which, after reciting that the seaward boundary was usually 3 miles, further recited that "the gulfward

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boundary of Louisiana is already located in the Gulf of Mexico three leagues distant from the shore." The legislature then "fixed and declared" the boundary to be a line 27 miles out, an act which obviously *extended* the boundary seaward.

Yet, although the boundary was not extended until 1938 and was assertedly recognized to be at 3 leagues in 1936 when lease No. 340 was issued, The Texas Company contends that by the 1943 agreement the lease was "interpreted" to extend out to the 27-mile line. Texas does not attempt to state upon what basis the interpretation was made; it states only that it is sufficient that the State Mineral Board had power and authority to "issue, interpret and amend leases" and that it interpreted the lease as extending 27 miles into the Gulf (Texas' brief, p. 26).

The 1943 amendment did not specifically enlarge the area covered by the 1936 lease. In fact, the agreement first repeats the description contained in lease No. 340 (pp. 2-3), and, after setting out other matters not material here, recites that a question having arisen whether the lessee has complied with its obligations under lease No. 340, the "said parties have agreed to release from the terms of said lease certain property more particularly described below * * *" (p. 5). This is certainly not language indicative of an intention to extend the area previously covered by the lease.

The agreement then lists each of the retained portions, introducing the description of each parcel with the following or substantially identical words:

That such of the property covered by State Mineral Lease No. 340 * * as is embraced in that area designated as [name of area] * * *, and hereinafter described and outlined in red on the map hereto attached and made a part hereof * * * is expressly retained by TEXAS * * * under State Mineral Lease No. 340, as by this agreement amended, and shall continue to be so held under the original provisions and subject to the terms and conditions of said lease and this agreement. That the said property so retained and the said [name of retained parcel] * * * are described as follows: * * *.

The particular description of the South Marsh Island Prospect (Article X, pp. 20-21) read as follows:

* * * That the said property so retained and the said SOUTH MARSH ISLAND PROSPECT are described as follows:

All of the property now or formerly constituting the beds and other bottoms of lagoons, lakes, gulfs, bays, coves, sounds, inlets and other water bodies, and also all islands and other lands belonging to the State of Louisiana, and covered by State Mineral Lease No. 340, and being situated or included within the following described boundaries:

* * * * *

This language is followed by a description of the point of beginning on the south shoreline of Marsh Island and then the description of the west line of the prospect in these words:

THENCE South into the marginal or maritime belt of the Gulf of Mexico to the extreme limit or boundary of the domain, territory and sovereignty of the State of Louisiana; * * *.

The descriptions of the Southwest Marsh Island Prospect and the Rabbit Island Dome Area follow the same pattern (Article XI, pp. 22-23; Article IV, pp. 10-11).

The resolution of the State Mineral Board referred to in the introductory portion of the 1943 agreement and made a part of the agreement states:

On motion of Mr. Shephard, seconded by Mr. Heywood, the Board unanimously voted to enter into an agreement with The Texas Company, * * * whereby the said parties, other than the State Mineral Board, release and relinquish unto the State Mineral Board and the State of Louisiana all of their right, title and interest in and to all of the area covered by State Lease 340 except those portions known as [the names of the retained areas] * * * which said portions of said lease shall continue to be held under the terms of the said original lease, the said retained areas being particularly described in a written instrument presented to the Board by Mr. Chas. H. Blish, representing The Texas Company, which instrument is, by reference, made a part of these minutes * * *.

In all of the quotations above the language is that of selection of a part from a whole and the retention of the selected areas. There is nothing to indicate that the 1943 agreement covered any area not previously covered by lease No. 340. In fact, the terminology is so explicitly that of diminution of the leased area that it is difficult to see how it could be interpreted as expanding the coverage of the lease.

Each particular description of a retained tract, including the three tracts in question, is so worded that all that is retained of the particularly described area is the portion that was originally in State Lease No. 340. Briefly the wording is: "All of the property * * * covered by State Mineral Lease No. 340, and being situated or included within the following described boundaries." In other words, even if the detailed description were to include an area not in the original lease, the 1943 agreement would apply only to that portion of the described area which was in the original lease. Thus assuming that the general descriptions of the three tracts encompass an area larger than that covered by the boundaries of the original lease, the area retained by the agreement would only be so much of the larger area as was included in the original lease. In an instrument of this tenor, it would require specific language to add to it areas so extensive, even if the Board were authorized to lease land in this manner.

The appellant relies heavily on the map of the South and Southwest Marsh Island Prospects as showing that those areas extended out to the 27-mile line. It is true that according to the scale of the map the areas are shown as extending beyond the 3-league line. However, the map does not show the south boundaries of the areas at all or the

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complete north-south boundaries so it is questionable whether the north-south lines depicted on the map were intended to be definitive. The map carried the express legend along the north-south lines that they ran "South to the Boundary of State Mineral Lease No. 340." Moreover, the description of each area commenced with the statement: "such of the property covered by State Mineral Lease No. 340 * * * as is embraced in that area * * * hereinafter described and outlined in red on the map hereto attached and made a part hereof * * *." These facts seem to make it clear that the map intended to show the two areas in question only as they existed prior to execution of the 1943 agreement.

Accordingly, it is concluded that the 1943 agreement did not extend the boundaries of the original lease, whether by interpretation or otherwise.

The appellant also points out that the State Mineral Board has treated the area within the east-west boundaries of the two prospects out to the 27-mile line as falling within The Texas Company lease. The fact that the Board has interpreted the lease in this fashion is not conclusive because, as set forth above, the Secretary has the primary duty to determine the area covered by a lease offered and because the legality of the Board's interpretation has been in litigation in the State court since 1947 (Texas' brief, p. 10).

There is one other factor which is pertinent to the interpretation of the area covered by lease No. 340 and the 1943 agreement, namely, the effect of the final paragraph of the description of the leased area in the original lease.

This reads as follows:

All of the above described property lying within the Parishes of Vermilion, Iberia, St. Mary, and Terrebonne, State of Louisiana.

The question of whether the boundaries of the Gulf parishes were extended along with the extension of the boundaries of the State by Act No. 55 of 1938 was mentioned by the Supreme Court of Louisiana in *State v. Farroba*, 9 So. 2d 539 (La. 1942), but the case was disposed of without deciding the point. Apparently, the uncertainty of the parish boundaries was a matter of general concern for by Act No. 32 of 1954 (LSA—R. S., 1956 Supp., 49:6), Louisiana declared that the parish boundaries extend to the outer gulfward boundary of the State of Louisiana and that the gulfward boundaries of the coastal parishes extend coextensively with the gulfward boundary of the State.

The doubts intimated in the *Farroba* case and the subsequent resolution of the problem by legislation militate strongly against the facile assumption by the appellant that the boundaries of its lease moved gulfward along with Louisiana's because its lease was tied

not only to the boundary of the State but those of the parishes as well.¹

In summation, the applicable provisions of the Submerged Lands Act and the Outer Continental Shelf Lands Act are harmonious and unambiguous. The specific provisions for validation of offshore leases are consonant with the equitable considerations which motivated Congress to provide specific relief. In enacting these provisions affording this relief, Congress obviously intended that they should be administratively construed to authorize validation of leases in disputed areas of the Gulf of Mexico, and especially in those areas which do not extend beyond 3 marine leagues into that Gulf.

This disposition is in harmony with the decisions of the Supreme Court in *United States v. California*, 332 U. S. 19 (1947); *United States v. Louisiana*, 339 U. S. 699 (1950); and *United States v. Texas*, 339 U. S. 707 (1950). The basic issue for determination in those suits was the ownership of resources, not the location of State boundaries. Boundary questions were clearly left unresolved, especially in the Gulf of Mexico area. See *United States v. Louisiana, supra*, 705-706.

Insofar as the leases under consideration are concerned, the primary question simply is—Where is Louisiana's outer boundary in the Gulf of Mexico? A preliminary answer is fairly obvious. Under applicable law, that outer boundary either is 3 miles from the shoreline or it is 3 marine leagues from the shoreline. The secondary question is—Where is the shoreline?

The better authority is that the shoreline is a combination of the low watermark on the shore and straight lines from outer points on bays. This is consonant with the Submerged Lands Act. The Secretary's authority under specific provision of statutory law to validate leases clearly comprehends leases for those areas between that 3-mile line and the 3-marine-league line drawn from the shoreline which were granted in good faith by the State of Louisiana under the assumption that the resources were its property. In that area it appears clear that The Texas Company is entitled to validation.

The Director and Acting Director have summarily disposed of the very issues which Congress in its legislation on the subject wisely left open for judicial determination and for interim equitable adjustment. Indeed, they would nullify absolutely those equitable administrative adjustments which Congress specifically authorized. I refuse "to make a fortress out of the dictionary" as was done in those decisions. See *Markham v. Cabell*, 326 U. S. 404, 409 (1945). " * * *

¹ Louisiana apparently has abandoned its claim to a boundary set by the 1938 act and now asserts that its boundary is 3 leagues gulfward of a coastline as defined in a later act. Act No. 33 of 1954, LSA—R. S., 1956 Supp., 49:1.

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The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as *Holy Trinity Church v. United States*, 143 U. S. 457 illustrates. The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve." *Id.*, p. 409. See also *Cox v. Roth*, 348 U. S. 207, 209 (1955).

The Submerged Lands Act and the Outer Continental Shelf Lands Act must be read as a whole. The legislative history of both acts is replete with expressions that equity should be done to those who acted in good faith under State-issued leases, and section 6 was designed to accomplish that end. (S. Rept. 411, 83d Cong., 1st sess., p. 2; H. Rept. 1031, 83d Cong., 1st sess., p. 12.) It is fundamental that the plain purpose of a statute is not to be negated by strict construction. See *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937); *United States v. Menasche*, 348 U. S. 528, 538 (1955).

The record is clear that Texas falls within the class intended to be protected by section 6. Substantial sums have been paid to the State of Louisiana since the 1943 agreement. In addition, large sums have been expended in exploration and development by Texas. (Affidavits of George E. Mott, J. O. Parris and J. C. Edwards filed in these proceedings.) Nothing in this record would warrant a finding that Texas lacks *bona fides*.

The southernmost limits of the areas covered by lease No. 340 and the 1943 agreement were left undefined and described merely as "the extreme limit or boundary of the domain, territory and sovereignty of the State of Louisiana." It seems clear that the State never contemplated that the area covered by these instruments was less than 3 leagues from the coastline.

The State appears clearly to have assumed a 3-league boundary historically and asserted such a claim in *Louisiana v. Mississippi*, 202 U. S. 1 (1905). However erroneous this claim may have been, the claim seems to have been reasonable in the light of the Enabling Act of 1811 (2 Stat. 641), the Act of Admission of 1812 (2 Stat. 701), and the first constitution of Louisiana (Louisiana Statutes Annotated—Constitutions, 1955, p. 511). While unwilling to confirm such claims in the Submerged Lands Act *ex proprio vigore*, the Congress certainly did not deny their reasonableness when it permitted their judicial determination under the language of section 2 (b) of that act.

From the above I conclude that lease No. 340 and the 1943 agreement did include lands out to the 3-league line from the coastline.

So far as lands beyond that line are concerned, as heretofore in-

dicated, I am constrained to reach a contrary conclusion. This becomes important because it determines the area to be administered as included within the lease. Louisiana's claim to lands beyond the 3-league line rested solely on Act. No. 55 of 1938 enacted by the Louisiana Legislature. That such a claim was clearly untenable is demonstrated by the fact that the Congress rejected all such claims in section 2 (b) of the Submerged Lands Act. There is even grave doubt that Act No. 55 is constitutional, to the extent that it may have attempted to enlarge rather than merely define the constitutional boundaries, since the boundaries of the State were fixed in the State constitution.

The record here does not warrant the conclusion that the State Mineral Board intended that the 1943 agreement should impose on the State any legal obligations in the event the State's claim to lands beyond the 3-league line should be held unavailing. And Texas does not contend that any of its exploration or developmental effort was expended beyond the 3-league line. In my opinion, then, the most that can be said for the 1943 agreement is that the Board may have intended to interpret the original lease to include lands beyond the 3-league line on the condition that the 1938 claim would be judicially sustained. That contingency has never occurred. *United States v. Louisiana*, 339 U. S. 699 (1950).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decisions of the Director and the Acting Director are reversed and remanded for further action in accordance with this decision.

ELMER F. BENNETT,
Solicitor.

**ESTATE OF WALKS WITH A WOLF,
DECEASED CROW ALLOTTEE NO. 137**

IA-254

Decided February 21, 1958

Indian Lands: Descent and Distribution: Generally—Indians: Domestic Relations

In probating the restricted estate of a deceased Indian of the Crow Tribe of Indians of Montana, no person can be recognized as the adopted heir of such decedent under the act of March 3, 1931 (46 Stat. 1494), unless the adoption was approved in the manner provided by that act. The initiation of certain action to obtain the required approval of the superintendent is ineffective where such approval was not given, and, therefore, a status as an adopted heir of the decedent is not achieved.

February 21, 1958

**APPEAL FROM AN EXAMINER OF INHERITANCE
BUREAU OF INDIAN AFFAIRS**

Libbie Childs; Jeanette Burns, Mary Cecelia Burns Lee, Charles Red Wolf and Edward Red Wolf, claiming to be the lawful heirs of Walks With A Wolf, deceased Crow allottee No. 137, have appealed to the Secretary of the Interior from an order by an Examiner of Inheritance, dated October 28, 1955, denying the petition for a rehearing which they filed in the matter of the probate of the decedent's estate. Under the Examiner's original order in this case, dated January 25, 1955, Elizabeth Fitzpatrick (Tobacco) was found entitled to all of the decedent's estate as his adopted daughter.

It is the appellants' contention, submitted in their behalf by counsel, that Elizabeth Fitzpatrick cannot be recognized as the heir of the decedent on the basis of an adoption because such a relationship had not been approved in accordance with the requirements of the act of March 3, 1931.¹ As its context shows, the 1931 act is a special act, confined in its applicability to the Crow Indians of Montana. The purpose of this legislation (S. 6098) is clearly reflected by the report on its companion bill (H. R. 16862), i. e., "to create an orderly procedure in connection with the inheritance rights of children adopted by members of the Crow Tribe of Indians."²

The record discloses that the decedent died intestate on September 12, 1953. The Examiner stated in her original decision that there was on file at the Crow Agency Office a sworn statement of the decedent, executed by him on May 5, 1937, and designated as a "Confirmation of Adoption to comply with the act of March 3, 1931 (46 Stat. 1494)." By this document the decedent expressed the desire to confirm and to make a record under the 1931 act of an adoption, apparently by Indian custom, of Elizabeth Fitzpatrick when the latter was about one year of age in the year 1911. Moreover, his statement in that respect is followed on the same document by a statement executed and likewise sworn to by Elizabeth Fitzpatrick on May 20, 1937, when she gave her age as 27.³ While this document has a blank

¹ 46 Stat. 1494. "That hereafter no person shall be recognized as an adopted heir of a deceased Indian of the Crow Tribe of Indians of Montana unless said adoption shall have been by a judgment or decree of a State court, or by a written adoption approved by the superintendent of the Crow Indian Agency and duly recorded in a book kept by him for such purpose: *Provided*, That adoption by Indian custom made prior to the date of approval hereof involving probate proceedings now in process of consummation, shall not be affected by this Act."

² H. Rept. 2604, 71st Cong., 3d sess.

³ The action of the parties in this respect apparently was initiated because of instructions issued by the Bureau of Indian Affairs, approved by the First Assistant Secretary of the Interior on December 21, 1936, prescribing procedures to be followed incident to the confirmation of adoptions under the act of March 3, 1931. These instructions are referred to as Exhibit B, in the Examiner's decision of October 28, 1955, denying appellants' petition for a rehearing.

space provided for the required approval of the superintendent, no such approval appears to have been given, neither is there any definite explanation as to what happened to the document after its execution by the decedent and Elizabeth Fitzpatrick. A deposition was taken from Mr. Robert Yellowtail, the former Superintendent of the Crow Agency, who was acting in that capacity during the month of May, 1937. He could not recall ever having seen the document in question until or about the fall of 1953. While it is not clear by this indefinite reference whether the former Superintendent first saw the document before or after the decedent's death on September 12, 1953, he was sure, in answer to the question whether "during the month of May, 1937, or during any of the next several months while you were Superintendent of Crow Indian Agency, * * *," that the document was not presented to him for approval. The former Superintendent stated further that he knew of no reason why the document was not presented to him for approval, and that he would have approved the document had it been presented to him. Accordingly, and on the apparent theory that the superintendent's failure to act was a neglect of duty imposed upon him by law, the Examiner regarded the relationship between the decedent and Elizabeth Fitzpatrick as a valid adoption under the provisions of the 1931 act.

We cannot agree with the Examiner's conclusions regarding the effect to be given to the document. Such provisions of the 1931 act as can be regarded as mandatory extend to that portion of the act which, after permitting the recognition of an "adopted heir" of a deceased Crow Indian, require specifically that the adoption "shall have been by a judgment or decree of a State court, *or by a written adoption approved by the Superintendent of the Crow Indian Agency and duly recorded in a book kept by him for that purpose.*" [Italics supplied.] Absent compliance with these provisions, and with the exception of Indian custom adoptions made prior to the date of approval of the 1931 act involving probate proceedings *then* in the process of consummation, no person could be recognized as an adopted heir of a deceased Crow Indian. The stated requirements were not met in the present case. In fact, under the instructions approved December 21, 1936, it was essential also that all of the parties appear before the superintendent, and preferably at the same time. There is nothing to indicate that this was done. It is apparent that for the proper performance of the role in which Congress cast him, the superintendent necessarily was required to exercise a high degree of discretion, based upon a complete analysis of the circumstances in each case, to determine whether a relationship between any parties had actually resulted in an adoption and thereby giving rise to valuable inheritance rights. Having determined in any given

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case that recognition could be accorded under the 1931 act to an adoption, specific action by the superintendent, including approval, was then required. However, no such requirement is imposed where recognition is withheld, and the superintendent is not compelled in such a circumstance to act affirmatively. Consequently, it follows that there is no violation of any duty on his part where the superintendent either has refused or failed to approve an adoption, but in such a situation, as here, his non-action necessarily will have to be given the same effect as an affirmative disapproval.

But it is stated that approval would have been given to the document of adoption had it been presented to the superintendent. This is a mere conjecture, particularly since approval of the document without the presence of the parties before the superintendent would have been directly contrary to the instructions issued on the subject. Nevertheless, it is extremely doubtful that the former superintendent's statement has any probative force, given as it was after the decedent's death and when the rights to the estate had become fixed. In this particular connection, and likewise involving a closely parallel situation to the present circumstances see *Davis v. Williford*, 271 U. S. 484 (1926). In this case the Court had before it a will of a deceased full-blood Chickasaw Indian, whereby that decedent had attempted to devise his restricted real estate to his sister in derogation of the inheritance rights of his wife and children. The validity of the will was governed by the following provision in section 23 of the act of April 26, 1906 (34 Stat. 137, 145), dealing with the Five Civilized Tribes:

* * * That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner.

The Chickasaw decedent's will in the *Davis* case bore only the endorsement of the United States Commissioner that it had been approved by him, and the will's invalidity was claimed on the theory that the instrument had not been acknowledged by the United States Commissioner, as required by the 1906 act. The United States Commissioner testified at the proceedings on the will that at the time he approved such instrument the testator had appeared before him and acknowledged its execution, but that, by inadvertence, the certificate of acknowledgment had been omitted. The Supreme Court held that Congress, by granting to a full-blood Indian the power to dispose of his restricted land by will, intended that a will disinheriting those to whom his land would otherwise descend shall be valid only when the facts of acknowledgment and approval should both be certified by the officer and appear upon the will when probated and

placed of record. Since the statutory requirements had not been met, the will was determined to be invalid. Regarding the offered proof of acknowledgment by the officer who had failed to affix a certificate of acknowledgment to the will, the Court said (p. 487-488):

* * * the officer was not to approve the will unless the testator appeared before him in person and acknowledged its due execution, and, upon the examination of the testator, the will appeared to be of such a character and based upon such consideration as to warrant its approval. Plainly, it was not intended that such acknowledgment and approval should be a perfunctory matter. And as the will when probated and recorded would be a muniment of title to the land, necessarily a certificate both of the acknowledgment and the approval should appear upon it. We cannot think that Congress intended that in a matter of this solemnity and importance, involving the recorded title to land, the effect of a will, which when probated and recorded bore no certificate of the acknowledgment or approval essential to its validity, should thereafter rest in parol, subject to all the uncertainty that would follow if its validity could be established—when the lips of the testator were closed—by parol evidence as to the fact of acknowledgment or approval. This would destroy the certainty which is essential in muniments of title appearing upon the public records. If this were possible, the subsequent establishment of the validity of the will would largely depend upon the lapse of time before it was brought into litigation, and the availability, at that time, of evidence to establish or to contradict a claim that it had in fact been acknowledged or approved * * *.

For the above reasons the unapproved confirmation of adoption, executed by Walks With A Wolf and Elizabeth Fitzpatrick, is regarded as ineffective to make the latter an adopted heir of the decedent. There being no approval, as required by the 1931 act, there is no adoption for purpose of inheritance. Moreover, a contrary construction would supply in effect an adoption status which does not exist, and the avowed purpose of the 1931 act to create an orderly procedure in connection with the inheritance rights of persons adopted by members of the Crow Tribe of Indians would not be achieved, but uncertainty and confusion would result. Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509, as revised; 17 F. R. 6793), the decisions of the Examiner are reversed. The present proceeding is remanded to the Examiner for a further decision, consistent with the views expressed herein, determining the heirs of the decedent and giving notice of the decision to the interested parties pursuant to the departmental probate regulations.

EDMUND T. FRITZ,
Deputy Solicitor.

March 3, 1958

**MEMBERSHIP—CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION****Indian Tribes: Constitutions—Indian Tribes: Membership**

Failure of the Secretary of the Interior to disapprove a Tribal Council ordinance which is inconsistent with the tribal constitution does not validate the ordinance.

M-36476**MARCH 3, 1958.**

TO THE COMMISSIONER OF INDIAN AFFAIRS.

A question has been raised whether this Department will recognize as effective, at least as far as the Department is concerned, ordinances passed by the Tribal Council of the Salish and Kootenai Tribes of the Flathead Reservation in Montana, by which the Council authorizes itself (1) to remove from enrollment members who were previously enrolled in literal compliance with the membership criteria set forth in the tribal constitution and (2) to change the provision of that constitution which extends future membership to all children or to any member of the Tribes "who is a resident of the reservation at the time of the birth of said children * * *," without complying with the constitutional procedure for such action. The Commissioner of Indian Affairs is advised to point out to the Tribal Council that serious doubts as to the legality of the resolution involved prevent him, as representative of the United States in its capacity as guardian of tribal assets, from recognizing the disenrollment of present members and the failure to enroll new members, insofar as such actions are predicated on the authority of the tribal resolutions inconsistent with the tribal constitution.

The proposals ("resolutions" or "ordinances") made by the Tribal Council on November 24, 1953, purporting to give the Council authority "to approve or reject the enrollment of any persons who were enrolled by the enrollment committee of April 3, 1944, or of any subsequently appointed enrollment committee" were void *ab initio*, for it is clear that the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation do not authorize the Council of such tribes to propose ordinances which will change the eligibility requirements set forth in Section 1 (a) and (b) of Article II of the Constitution with respect to existing membership. Their constitution gives the Council power only to *propose* ordinances, subject to review by the Secretary of the Interior, governing *future* membership. No authority in the constitution empowers the Council retroactively to take membership away from persons properly

recognized and included as members under constitutional criteria then in effect.

As to future membership, the constitutional power to propose ordinances does not imply a power to enact ordinances. The Constitution of the Flathead Reservation Indians, enacted October 4, 1935, appears to be the first adopted pursuant to the Indian Reorganization Act. Later constitutions differ considerably. One important difference is in the power granted to the Council on the subject of future membership. Section 2 of Article II, of the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, provides that :

The Council shall have the power to *propose* ordinances, subject to review by the Secretary of the Interior, governing future membership and the adoption of members by the Confederated Tribes. [Italics added.]

In the article entitled "Powers and Duties of the Tribal Council," the Council is given power only "to *enact* resolutions or ordinances not inconsistent with Article II of this Constitution governing adoption and abandonment of membership." Article VI, Sec. 1 (k). The intent appears to be that the Council can propose ordinances governing both future membership and adoption, but can enact only ordinances concerning adoption and abandonment of membership. Ordinances which it proposes but which it is not authorized to enact must be presented to the Tribe for enactment. Article IX of the Constitution provides for submission of a "proposed ordinance or resolution of the Council * * * to a popular referendum, and the vote of a majority of the qualified voters voting in such referendum shall be conclusive and binding on the Tribal Council, provided that at least thirty percent (30%) of the eligible voters shall vote in such election."

It may be suggested that the word "propose" means "promulgate" or "enact" or "adopt." It will be noted that these latter words are used elsewhere in the same section of the constitution when considering such power. (See Article VI, Sec. 1 (i), (1) (n) (u).) Furthermore, Indian Reorganization Act Tribal Constitutions which empower the Council to enact ordinances governing future tribal membership generally employ those terms of finality. (See, for example, Blackfeet, Lake Superior Chippewa and Colorado River Tribes—"promulgate"; Kescalero Apache and Catawba Tribes—"pass.")

The power to determine the basis of membership in a tribe, involving as it now does substantial property interests, is of great importance to each member individually as well as to the tribe col-

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lectively, whether it concerns expansion or diminution of membership. If the Tribal membership has delegated this power, such delegation should be clear, and this is especially so where the delegation involves a change in customary tribal law. The provisions of the Flathead Constitution, as well as tribal custom, indicate that the power to change tribal law concerning future membership, except as to adoption and abandonment of membership, was not delegated to the then newly created Tribal Council of delegates, but is to be exercised through a popular referendum, as provided by Article IX of the Tribal Constitution. If the Flathead Indians wish to amend their constitution to give this power to the Tribal Council established by their 1935 constitution, Article X thereof provides for such action. This Tribe has previously amended its constitution to enlarge the power delegated to the Tribal Council (see Amendment I to the Constitution, adopted Dec. 10, 1948) so no procedural difficulties should be experienced.

Reviewing the facts, the Tribal Council's proposal is that in the future children of members of less than a certain amount of "Kootenai and Salish" blood be disqualified from membership although they possess the amount of "Indian" blood required for membership by the constitution. A specific illustration involves enrollment of Germaine and Betty Low White, approximately 6½ years and 4 years old, respectively, who are ⅗ Flathead, ⅘ Chippewa, and the balance non-Indian blood. Their sister, Janet Marcelline, 13, is enrolled.

The constitution of these Confederated Tribes, adopted pursuant to section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), does not limit membership to persons of "Kootenai or Salish" blood. It provides that membership shall include "all children born to any member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, who is a resident of the reservation at the time of the birth of said children * * *." (Sec. 1 (b), Art. II.) In a letter dated February 10, 1955, to the Flathead Tribal Council, you concluded:

The basic membership provisions under which the tribe is now operating were enacted approximately 20 years ago. The situation has changed materially since that time. Whether the tribe wishes to amend section 1(b) (of Article II) * * * must be determined by its members.

This recommendation is sound.

Certain other tribes organizing subsequently under the Indian Reorganization Act, which desired to limit enrollment to children born of the "blood" of a particular tribe, specifically did so in their constitution. (See for examples, Blackfeet, Ute, Fort Mohave, and Absentee-Shawnee Tribal Constitutions, Article II.) The Hualapai

Tribe originally adopted the same broad constitutional provision as that quoted above, but their constitution was amended as of October 22, 1955, as provided by section 16 of the Indian Reorganization Act, and now limits membership to "any child of one-fourth degree or more of Hualapai Indian blood."

Under the specific provisions of the tribal constitution, therefore, the three White children would be entitled to enrollment. Failure to enroll the younger children resulted from an interpretation of tribal ordinances which purport to amend and limit the constitutional provisions referred to. Ordinance No. 4-A, October 4, 1946, of the tribal council, required " $\frac{1}{16}$ degree of Indian blood" as a limitation, but removed, by implication, the restriction concerning residence of the parents. Ordinance 10-A, April 3, 1951, rescinded the previous ordinance and further limited children as members by prohibiting membership to those who have "less than one-quarter degree Indian blood." Ordinance 18-A, adopted November 24, 1953, sought still further to limit the constitutional provision by requiring that "hereafter no person shall be enrolled as a member of the Confederated Salish and Kootenai Tribes who is less than $\frac{1}{4}$ degree of Salish or Kootenai Indian blood." The two younger White children evidently were born after the adoption of the 1951 Ordinance, 10-A, but only the youngest was born after the 1953 tribal action, Resolution 18-A. Their parents resided on the reservation at the time of the birth of each child. Since Ordinances 4-A, 10-A, and 18-A were designed to alter the constitutional provisions concerning tribal membership, and since these matters should be determined by a tribal referendum or constitutional amendment, the Commissioner should, as already suggested, advise the tribal authorities to consider resolving the problems presented in a manner consistent with their tribal constitution because he is obligated to distribute tribal funds, held in trust, pursuant to such constitution.

It has been emphasized that the Secretary of the Interior did not disapprove the purported membership ordinances at the time of their submission to his office for approval. Even if a tribal council resolution were specifically approved, in whole or in part, it might, nevertheless, be invalid in whole or in part.

The Commissioner must refuse to recognize a tribal ordinance which he has reasonable ground to believe invalid, and can recommend action to validate such ordinance. This duty arises from the requirements of section 16 of the Indian Reorganization Act of June 18, 1934, *supra*, that amendments to such a tribal constitution as here involved be effected only at elections called by the Secretary for that purpose and that their text be approved by him. Further, the pro-

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visions of the tribal constitution itself put a responsibility on the Secretary to review ordinances governing future membership (see Article II, sec. 1, and Article VI, sec. 2).

This responsibility of the Secretary is not a gratuitous interference in the internal affairs of the tribe, nor is it an adjudication of a controversy. It involves a fundamental matter arising from the relationship of the tribe with the United States concerning the privilege of membership in the tribe. The tribe determines its membership, but it is a responsibility of the Secretary to make sure that those who purport to act for the tribe in determining membership have authority to do so; that they have acted in conformance with their tribal laws and constitution; and that those whom they assert to be tribal members are, in fact, the Indians with whom the United States must deal as members. With regard to this question of the finality of a tribal determination as to its membership the Secretary of the Department of the Interior has expressed his view:

The power of an Indian tribe to determine its membership is subject to the qualification, however, that in the distribution of tribal funds and other property under the supervision and control of the Federal Government, the action of the tribe is subject to the supervisory authority of the Secretary of the Interior. [Citing *United States ex rel. West v. Hitchcock*, 205 U. S. 80 (1907); *Mitchell v. United States*, 22 F. 2d 771; *United States v. Provoe*, 38 F. 2d 799; reversed on other grounds, 283 U. S. 753 (1931). See also *Wilbur v. United States*, 281 U. S. 206.] The original power to determine membership, including the regulation of membership by adoption, nevertheless, remains with the tribe * * *. [55 I. D. 14, 39, 40 (1934).]

EDMUND T. FRITZ,
Deputy Solicitor.

CONSENT OF INDIANS FOR SALE OF ALLOTTED TIMBER

Indian Lands: Timber—Secretary of the Interior

Although no clear authority has been delegated to the Secretary of the Interior to dispose of timber upon allotted Indian land without the consent, express or implied, of all co-owners, he has authority, and also a responsibility to approve and facilitate the sale or other salvage of timber thereon without obtaining unanimous consent, in order to prevent loss from fire, decay, insect infestation or disease.

M-36477

MARCH 5, 1958.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

In your memorandum of May 20, 1957, you again raise the difficult problem of the necessity of unanimous consent of co-owners to the sale of timber upon allotted Indian land. You question whether the

owner of a small fractional interest in allotted land can validly prevent a sale of timber thereon which appears obviously favorable to all owners. You also ask whether consent can be given to such a sale if it involves timber so damaged by fire, insects or disease that delay in obtaining consent of all owners may render the timber valueless.

The first question is one of statutory interpretation. Restrictions upon alienation of allotted Indian lands at first precluded the sale of timber therefrom, where the chief value of the land was in its timber. *Starr v. Campbell*, 208 U. S. 527 (1908). In 1889, Congress, as a result of a misinterpretation of a Supreme Court decision (see hereafter), empowered the President to authorize, subject to regulations, Indians residing on reservations or allotments to dispose of dead timber. (Act of February 16, 1889, 25 Stat. 673.) In 1910, the Secretary requested more general authority of Congress. He stated:

There is no general law under which authority for the sale of timber on Indian lands, whether allotted or unallotted, can be granted, except the act of February 16, 1889 (25 Stat. L., 673), under which the President may authorize the sale of dead timber, standing or fallen, on Indian reservations or allotments. The provisions of the act of April 21, 1904 (33 Stat. L., 189), empowers the Secretary of the Interior to authorize the sale of timber on allotments within the State of Minnesota, and the President has authority under the Chippewa treaty of September 30, 1854 (10 Stat. L., 1109), to permit Indians who receive lands under the treaty to cut timber from their allotments.

It is believed by this department that there should be a general law applicable to all Indian lands, because in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment.

It is also important that there be authority to cut the mature timber from unallotted Indian lands, because much of it goes to waste under existing conditions. If the timber could be cut, it would furnish employment to Indians who now are unable to find work; it would furnish funds for tribal uses which could take the place of funds that must now be appropriated from the Treasury for their support. The department is doing everything it can to induce the Indians who have been living in accordance with their primitive habits to take up gainful pursuits. In many cases this problem could be solved by furnishing employment in cutting the timber, which is the most available industry to which their hands could be turned. * * * The economic waste incident to withholding authority for cutting that which is deteriorating and which, if removed, would make way for new growth, should be given due consideration.

It is believed that legislation on this subject is very greatly needed. [Report No. 1135, H. R. 24922.]

The resulting act of June 25, 1910 (sec. 8, 36 Stat. 857; 25 U. S. C. sec. 406), provides that:

The timber on any Indian allotment held under a trust or other patent containing restrictions on alienations may be sold by the allottee, with the consent of the Secretary of the Interior, and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

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Congress also provided for the sale of timber on unallotted lands (sec. 7).

In *United States v. Eastman*, 31 F. Supp. 754 (1940), 118 F. 2d 421, cert. denied, 314 U. S. 635, the circuit court said that these provisions show an intent of Congress to formulate a definite policy concerning the sale of timber on Indian lands, and it was proper for the Secretary of the Interior to develop a policy beneficial to future Indians. The circuit court upheld various provisions protecting growth of young trees, mitigating fire hazards, and otherwise regulating the sale of the timber. Nevertheless, it is very doubtful whether the Secretary has authority to consent to such a sale of timber without the approval, express or implied, of all the Indian owners of the particular timber to be sold, even though his discretion in the disposition of timber is broad. There are numerous acts of Congress delegating broad powers of discretion to the Secretary with respect to selling, leasing, or granting easements or other interests in Indian lands or disposing of the products thereof, or approving such actions by Indian restricted owners, but unless the statute specifically empowers the Secretary to act without the consent or approval, express or implied, of all co-owners, as in the partition statutes to which you refer (acts of June 25, 1910 (36 Stat. 855), and May 18, 1916 (39 Stat. 127), as amended; 25 U. S. C. secs. 372 and 378), he has been reluctant to face possible litigation from a hostile minority ownership, even if the transaction appears in the best interests of all co-owners.

The disposition of timber to prevent loss raises another question. This involves a possible obligation of the Secretary of the Interior as well as of the co-owners to prevent a dissipation of a part of the estate, and thus, in effect, to preserve it. It also involves the right of a co-tenant to cut and sell timber. The Supreme Court has distinguished the cutting and sale of timber as a byproduct from the cutting of merchantable timber on timberland, i. e., capital depletion. It has recognized the rights of allotted Indians having land primarily agricultural to sell timber cut from such lands. *United States v. Paine Lumber Co.*, 206 U. S. 467 (1907); cf. *Starr v. Campbell*, *supra*.

The same view had been developed by the Attorney General. In 1889, he reasoned that it was the duty of the United States, as trustee for the Indians, "to preserve and protect the trust." For the Indian to sell growing timber or timber cut for commercial purposes normally would be unlawful waste and to allow it would be "inconsistent with the obligation of the trustee," the Attorney General agreed, citing *United States v. Cook*, 19 Wall. (86 U. S.) 591 (1873), but since the land in question was allotted under the allotment acts to

"be used for agricultural and grazing purposes," whatever was cut "for the promotion of these purposes" by the Indian allottee "the trustee should permit." (19 Op. Atty. Gen. 232.) This opinion was followed by that of May 21, 1890, in which the Attorney General said that the sale and removal of dead timber, standing or fallen, by an allottee was not wasting the estate, either at common law or by the law of Wisconsin where the property was situated, but was more in the nature of benefiting it. He cited as analogous, "the liberal American doctrine of waste" which permits the tenant to cut timber to open land for cultivation. (19 Op. Atty. Gen. 559.)

The law of waste developed in England as a protection to the inheritance from acts of tenants of all kinds. Waste is material injury by the tenant to the property as a whole, such as cutting valuable timber (Tiffany, *Real Property*, secs. 630-34, 651). In this country the rule has been modified, as a result of the demand to clear land, so that cutting timber is regarded as waste only if it decreases the value of the land (see Tiffany, *supra*, sec. 634, and cases cited). Still another test is what one would do if he were sole owner of the fee (see Tiffany, *supra*, sec. 634, cases cited, Note 41). In any event, the cutting and sale of dead timber has never been regarded as waste (Tiffany, *supra*, sec. 634; *Derham v. Hovey*, 161 N. W. 883 (Mich. 1917) and other cases cited; 21 A. L. R. 999). A co-owner is analogous to a tenant or co-tenant, since others than he have an interest in the inheritance which is protected by the law of waste.

The obligations of co-owners to sustain and protect the common interest is well established. *Glazier v. Tilton*, 81 S. W. 2d 145 (1934); *Hendrickson v. California Tale Co.*, 130 P. 2d 806 (1942); *Hoverson v. Hoverson*, 12 N. W. 2d 501 (1943); 86 C. J. S., 376. Although the cutting of merchantable timber by a tenant in common without the consent of the other co-owners may ordinarily be regarded as waste, for which he is liable, the law against waste among co-owners does not apply where the action is for mutual benefit, as in the cutting of timber to prevent spoilage. See 86 C. J. S., 382, 418, 419; *Johnson v. Johnson*, 11 S. C. Eq. 277.

Your view appears sound that the United States has a guardianship responsibility in a case where loss would result if certain damaged timber were not salvaged until all co-owners had been notified and given their consent. Refusal by the Superintendent, in such a case, to permit the salvage by an Indian co-owner of such decaying timber would not be consistent with his duties. It would be no justification that one or more co-owners had not given their consent because, as already indicated, an owner cannot object to the salvage of dead timber by a co-owner.

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It has been suggested that since congressional authority was sought to permit sales by Indians of dead timber on tribal land, similar express authority should be obtained in the case of prevention of loss from fire, insects or disease. These situations differ. The former was a result of an improper interpretation of *United States v. Cook*, 19 Wall. (86 U. S.) 591 (1873), the Attorney General ruling in 1888 that Indians occupying reservations, title to which is in the United States, "have no right to cut and sell for their use and benefit the dead and down timber * * * which will go to waste if not used." (19 Op. Atty. Gen. 194.) The *Cook* case permitted the United States to recover timber cut on Indian tribal lands, title to which was in the United States. The Attorney General concluded that since the court had stated that the Indians have "the mere right to use and enjoy the land as occupants," therefore, "the Indians have no interest in this timber," citing British cases to the effect that dead and fallen timber belongs to the remainderman and not to the tenant.

The Board of Indian Commissioners at once protested that such a construction, particularly when applied to dead and down timber, "would prove not only a loss to the Indians, but an absolute damage to the United States." (House Ex. Docs., No. 61, 43d Cong., 2d sess., vol. 12, Dec. 17, 1874.) This interpretation eventually resulted in the enactment of the act of February 16, 1889 (25 Stat. 673), which permitted the Indians "to fell, cut, remove, sell, or otherwise dispose of the dead timber standing or fallen * * *" on Indian reservations.

This view that the timber on Indian reservations belonged to the United States had also been implied from the *Pine River Logging Co.* case, 186 U. S. 279 (1902), but it was held to be unnecessary and improper in *Shoshone Indians v. United States*, 85 Ct. Cl. 331 (1937), *affirmed*, 304 U. S. 111 (1938). Congress subsequently directed the Secretary of the Treasury to credit to the Chippewas the amount of the *Pine River Logging Co.* judgment which had been mistakenly deposited in the Treasury of the United States as public money. (Act of June 15, 1938, 52 Stat. 688.)

It should be noted that some years before the 1889 statute the Secretary had urged enactment of such a law to permit the cutting and sale of timber "damaged by fire, storm, or by natural decay * * *," located "upon Indian reservations, in which the Indians have only a right of occupancy, or are mere tenants at will * * *," the proceeds, after payment of labor and other costs, to be deposited "to the credit of the Indians occupying the reservation * * *." President Arthur submitted the proposed legislation with a letter from the Secretary observing that the *Cook* case held that the Indians could not cut the timber "if the cutting of the timber is the principal thing and not

the incident," and that "the rule is the same in the case of damaged timber—at common law, windfalls are the property of the owner of the fee." (H. Ex. Doc., vol. 19, 47th Cong., 1st sess., No. 56, Feb. 2, 1882.) Thus the Act of 1889 could be said to be unnecessary, being based upon the premise that the Indians, as mere tenants, had no interest in the timber.

In conclusion, in view of the provisions of the 1910 act, *supra*, the Secretary should approve no sale of timber on allotted Indian lands without the consent, express or implied, of all owners thereof, except for sales of timber incidental to the prevention of loss by destruction or decay. In order to salvage timber, as in the case of timber damaged by fire, insects, or disease, and where delay in obtaining consent of all co-owners might render the timber valueless or seriously impair its value, a sale or other salvage of such timber by a part-owner without the consent of all the beneficial owners is proper and should be approved, and also facilitated, by the Secretary.

EDMUND T. FRITZ,
Deputy Solicitor.

UNITED MANUFACTURING COMPANY ET AL.

A-27608

Decided March 5, 1958

Oil and Gas Leases: Applications

An applicant for an oil and gas lease acquires no vested right to have a lease issued but only an inchoate right to receive a lease over a later applicant if a lease is issued.

Oil and Gas Leases: Noncompetitive Leases—Oil and Gas Leases: Applications

An applicant for a noncompetitive oil and gas lease who filed his offer prior to the amendment of the Mineral Leasing Act by the act of July 29, 1954, had no right to have a lease issued to him after that date subject only to the provisions of the Mineral Leasing Act as it existed prior to the amendments of that date, and the Secretary of the Interior had no authority to issue a lease after July 29, 1954, free from the amendments made on that date merely because the offer for the lease was filed prior to that date.

Oil and Gas Leases: Rentals

Where an offer for an oil and gas lease was filed prior to July 29, 1954, and the lease was issued after that date with a notation that it was subject to the act of that date, the lease was subject to the provision of the act of July 29, 1954, terminating leases automatically for failure to pay rental on time.

Oil and Gas Leases: Generally

A remote assignee of an oil and gas lease has no standing, in the absence of supporting evidence, to claim that the original lessee did not consent to the terms of the lease as it was issued.

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Oil and Gas Leases: Rentals—Oil and Gas Leases: Production

A lease is exempted from the automatic-termination-for-failure-to-pay-rental provision only if it contains a well capable of producing oil or gas in paying quantities; such a well is one that is actually in condition to produce production which exists in paying quantities and not one that is mechanically unable to produce because the casing has not been perforated and has only prospects of being a commercial well.

Oil and Gas Leases: Rentals

There is no exemption from the provision automatically terminating leases for failure to pay rental timely of leases which contain valuable deposits of oil or gas but do not have wells capable of producing in paying quantities.

Oil and Gas Leases: Rentals

The Secretary of the Interior has no authority under either section 32 or section 39 of the Mineral Leasing Act to waive or suspend retroactively rental which has already become due on an oil and gas lease so as to avoid the automatic termination of the lease because the rental was not paid when it became due.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

United Manufacturing Company, Louis W. Mack, Jr., L. A. Durant, S. Arndt, and Northern Natural Gas Producing Company have appealed to the Secretary of the Interior from a decision dated December 6, 1957, by the Acting Director of the Bureau of Land Management which affirmed the action of the manager of the Colorado land office in holding, in effect, that three noncompetitive oil and gas leases (Colorado 08830, 08861, 08862) terminated automatically for failure of the lessees to make timely payment of the fourth year's rental on the leases.

The appellants hold partial undivided interests in the three leases, having acquired such interests by mesne assignments.¹ The fourth year of the leases commenced on September 1, 1957, and the fourth year's rental was paid on September 6. (September 1 was a Sunday and September 2 was Labor Day, a holiday.)

¹ The lease files show that at this time undivided interests in the three leases are held by the following parties in the following shares:

Northern Natural Gas Producing Company	-----	1/2
S. Arndt	-----	1/4
United Manufacturing Company	-----	1/8
Louis W. Mack, Jr.	-----	1/16
L. A. Durant	-----	1/16

However, in its statement of reasons filed in support of its appeal, Northern Natural Gas Producing Company states that it has assigned all its interest in the leases to United, Mack, and Durant and therefore asks that the case be decided on the basis of the statement of reasons submitted by its assignees. Arndt has also simply stated that he supports the position of those assignees.

I

The primary issue in the case is whether the leases are subject to the act of July 29, 1954, which, *inter alia*, added the following sentence to section 31 of the Mineral Leasing Act, as amended:

* * * Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: *Provided, however*, That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made. [30 U. S. C., 1952 ed., Supp. IV, sec. 188.]

Prior to the addition of this sentence, section 31 provided, and still provides, that—

Any lease * * * shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. * * *

The appellants contend that their leases are subject only to the last quoted provision of section 31 and not to the automatic termination provision added by the 1954 act. They base their contention upon the following facts:

Offers for the three leases were filed on June 21 and 25, 1954, on Form No. 4-1158, Fourth Edition (Sept. 1953), as required by the Department's regulations (43 CFR 192.42). This form constituted not only an offer to lease, when signed by an applicant, but the lease itself, when signed by the manager (*id.*). On the back of the form were printed all the lease terms. Section 7 of the terms incorporated the substance of section 31 of the Mineral Leasing Act as it then stood (prior to the 1954 amendment), including the provision just quoted, except that it provided that the lease should be canceled for default only if the default continued for 30 days after the lessee was served notice of the default.

The lease offers in this case were signed by the manager on August 25 and 27, 1954, the leases having an effective date of September 1, 1954 (43 CFR 192.40a). Because the act of July 29, 1954, had been enacted between the filing of the offers and their acceptance by the manager, there was typed on each lease next to the manager's signature the following: "This lease issued subject to Public Law 555, Act July 29, 1954."

Under section 2 (d) of the lease terms and the applicable regulation (43 CFR 192.80) the lessees agreed to pay an annual rental "in advance." As we have seen, the fourth year's rental was not paid prior to September 1, 1957, the anniversary date of the leases, or on Sep-

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tember 3, the first business day following September 1. The rentals were not paid until September 6. The manager accordingly stated in a letter dated September 9, 1957, to Northern Natural Gas Producing Company, the lessee who paid the rentals, that he had no authority to treat the rental payments as being timely made under the 1954 act. This letter led to the present appeal.

The appellants contend that, as the lease offers were made prior to the enactment of the 1954 act for leases containing provisions then provided for by the law and regulations, including the right to 30 days' notice of any default and an opportunity to cure the default, the Government, by accepting the offers, chose to contract with the offerors on that basis and consequently cannot invoke against the lessees the automatic termination provision which was not in existence when the offers were made. This contention is based on a premise which the appellants assume and do not substantiate, namely, that after the enactment of the 1954 act, the Secretary of the Interior still had authority to issue leases upon the basis of the Mineral Leasing Act as it existed prior to the 1954 amendments.

It seems indisputable that with respect to lease offers filed *after* the enactment of the 1954 act the Secretary would be absolutely without authority to issue leases subject to the Mineral Leasing Act as it existed prior to the 1954 amendments. Does the fact that the lease offers in question were filed *prior* to the 1954 act give him any greater authority? From the standpoint of the 1954 act, there is not a word in that act which differentiates between the authority of the Secretary to issue leases upon the basis of offers filed after July 29, 1954, and the authority of the Secretary to issue leases upon the basis of offers filed prior to July 29, 1954. The only basis for such a distinction must rest on the proposition that offerors who filed before July 29, 1954, acquired by their filing a right to have leases issued to them on the terms and conditions existing prior to that date.

This proposition, however, cannot be sustained. The courts have held repeatedly that the issuance of an oil and gas lease under section 17 of the Mineral Leasing Act (30 U. S. C., 1952 ed., Supp. IV, sec. 226) is a matter within the discretion of the Secretary. *United States ex rel. Roughton v. Ickes*, 101 F. 2d 848 (C. A. D. C., 1938); *Dunn v. Ickes*, 115 F. 2d 36 (C. A. D. C., 1940), *cert. denied*, 311 U. S. 698; *United States ex rel. Jordan v. Ickes*, 143 F. 2d 152 (C. A. D. C., 1944), *cert. denied*, 320 U. S. 801; *cf. Wilbur v. United States ex rel. Barton*, 46 F. 2d 217 (C. A. D. C., 1930), *affirmed* 283 U. S. 35 (1931). As the court said in the *Roughton* case, *supra*: "The [Mineral Leasing] act does not say that the applicant is entitled to a lease. Rather, it specifically states that he 'shall be entitled to a preference right over

others to a lease of such lands without competitive bidding.' In other words, the mere filing of the application, when the statute does not place a duty upon the Secretary 'beyond peradventure clear', gives plaintiff no such vested interest as would leave a single remaining duty upon the Secretary, which may be commanded by mandamus." [101 F. 2d at 252.]

In accordance with these rulings, the Department has consistently held that an applicant for a noncompetitive lease acquires no vested right to a lease by the filing of an application but only an inchoate right to receive a lease over a later applicant, if the Secretary in his discretion decides to lease the land. *Warwick M. Downing*, 60 I. D. 433 (1950); *N. G. Morgan et al.*, 59 I. D. 400 (1947); see *International Trust Co., Trustee*, 60 I. D. 208 (1948).

From these judicial and administrative rulings, it is plain that when the offers for the appellants' leases were filed, the offerors acquired no right to have a lease issued but only a right to be preferred over later applicants for the same land in the event leases were to be issued. The offerors having no right to a lease, it is difficult to see how by the mere filing of their offers they could demand that leases issued to them after July 29, 1954, be written with the terms and conditions imposed by the Mineral Leasing Act prior to July 29, 1954. It is also impossible to see how the mere filing of the offers prior to July 29, 1954, could clothe the Secretary with authority to issue leases after July 29, 1954, in disregard of the amendments enacted on that date. In short, I conclude that there was no legal basis for issuing leases after July 29, 1954, free of the amendments enacted on that date.

The appellants contend that, offers having been made subject to terms and conditions in effect prior to July 29, 1954, the Government, as the offeree, could accept the offers as made, reject them, or make a counter-offer. They assert that the Government would have no right to accept an offer and amend unilaterally the terms of the contract requested by the offeror. It is undoubted contract law that if an offer to contract is made on certain terms and conditions, the offeree cannot unilaterally accept the offer on altered terms and conditions and thereby effect a binding contract. Acceptance on different terms amounts to a counter-offer which must be accepted by the original offeror before a contract results.

If we assume the applicability of those principles here, the appellants' contention goes too far, for the appellants claim, in effect, that the lessees never consented to inclusion in the leases of the automatic termination provision. If there was no consent by the offerors to the counter-offer by the manager of leases subject to the act of July 29, 1954, no contract could have resulted and the appellants in effect have argued themselves out of court. It is plain that leases could have

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come into existence only with the consent of both parties to the lease. Therefore, if the appellants wish to contend that there are outstanding leases which the appellants are entitled to have continued by their payment of the fourth year's rentals on September 6, 1957, they must necessarily agree that the lessees consented to the issuance to them of the leases that in fact were issued, i. e., leases subject to the act of July 29, 1954.

Although the appellants have argued lack of consent by the offerors, it is doubtful that they have the necessary standing to make such a contention. Lease Colorado 08830 was issued to Fred W. Mattson, Jr., the offeror. He assigned the lease on January 6, 1956, to C. G. Glasscock, Jr., and the latter assigned an undivided 50 percent interest to appellant Mack on January 23, 1956. Both assignments were approved effective February 1, 1956. Leases 08861 and 08862 were issued to David W. Garlett, the offeror. He assigned a 45 percent undivided interest in the leases to F. L. Rawls on October 2, 1954, the assignments being approved effective as of November 1, 1954. Rawls assigned his interest and Garlett his remaining interest to Glasscock by assignments approved effective as of February 1, 1956. Glasscock then assigned a 50 percent interest in the leases to appellant Mack effective as of March 1, 1956.

It thus appears that appellant Mack was two steps removed from the original lessee in the case of lease 08830 and three steps removed from the original lessee in the case of the remaining two leases, and he did not acquire his interest in the three leases until 18 months after they were issued. Appellants Durant and United Manufacturing Company acquired their interests in still later assignments and at later dates.² I cannot perceive, therefore, how the appellants are in a position to claim that the original lessees did not consent to the issuance of leases subject to the 1954 act. There is no evidence in the case files to that effect. On the contrary, there is a total absence of any protest by the original offerors and lessees, Mattson and Garlett, to the issuance of their leases subject to the 1954 act. Moreover, they made assignments of their leases without raising any question as to the propriety of the leases.

II

The appellants' second major contention is that, even if their leases are subject to the 1954 act, the automatic termination provision is inapplicable because all the leases were known to contain valuable de-

² S. Arndt and Northern Gas Producing Company were the last assignees in the chain of title of the three leases. They acquired their interests by assignments approved effective as of July 1, 1957, two months before the fourth year's rentals became due.

posits of oil and gas. In addition, they contend that the automatic termination provision does not apply to lease Colorado 08862 because that lease had on it on September 3, 1957, a well capable of producing oil or gas in paying quantities.

The facts recited by the appellants show that 4 wells have been drilled on the 3 leases. Government Wells Nos. 1 and 4 were drilled on lease 08861 and were abandoned as dry holes. Government Well No. 2 was drilled on lease 08830 and was also abandoned as a dry hole. Government Well No. 3 was drilled on lease 08862. It encountered the upper and lower Dakota formations on August 21 and 23, 1957, respectively. Both formations were tested by drill stem methods, and, in addition, a core analysis was made. Casing was set in the well prior to September 3, 1957; however, the casing was not perforated nor a production test made.

Referring back to the automatic termination provision as it was quoted earlier, it will be noted that it applies only to "any lease on which there is no well capable of producing oil or gas in paying quantities." Literally, this exclusion from the automatic termination provision applies only where (1) there is a well capable of producing and (2) the potential production exists in paying quantities. Although this particular provision has not been construed by the Department, the Department has indicated the view in other connections that a well capable of producing means a well which is in physical condition to produce.

In *Steelco Drilling Corporation*, 64 I. D. 214 (1957), the Department had before it the question whether a lessee was entitled to the benefits of the second paragraph of section 17 of the Mineral Leasing Act, as amended by the act of July 29, 1954. That paragraph provides that no lease "on which there is a well capable of producing oil or gas in paying quantities" shall expire because the lessee fails to produce the lease unless the lessee is given at least 60 days' notice to place the well on a producing status. Steelco had a producing well. Production tapered off whereupon sandfracing operations were conducted. Only small production was thereafter obtained and the well was shut down. The production superintendent said that the well could not be considered incapable of producing until further efforts were made to restore production, including hot oil treatment and case swabbing. The Department held that the well was not capable of production and therefore that the lessee was not entitled to the benefits of the second paragraph of section 17.

Steelco also contended that a determination as to whether its well was capable of producing should not be made until the sand above the formation from which it had been producing was tested. It claimed

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there were oil showings in that sand when the well was drilled through it. The Department said:

In connection with the appellant's assertion that a determination of whether its well is capable of producing should not be made until after the testing of the Wall Creek sand above the Dakota sand, a report by the Geological Survey states that a well drilled through a potentially productive sand, but not tested or placed on production in such a sand, is not regarded as a well capable of producing oil or gas in paying quantities within the meaning of the act of July 29. Neither the possibility that oil or gas might be produced from the well on this lease from a sand which has not been tested or produced nor the desirability of conducting further operations on this lease provide a basis for a determination under the third provision of subsection (1) of the act of July 29 that the well is, in fact, capable of producing oil in paying quantities. * * *

In *H. K. Riddle*, 62 I. D. 81 (1955), the question was raised whether a lessee was entitled to a suspension of production. A well on the lease had been drilled to a discovery sufficient to warrant including part of the leased land within the known geologic structure of a producing field. The well, however, was not produced. The Department denied the suspension for the reason that no production existed which could be suspended. The Department said:

* * * On March 4, 1955, the Director of the Geological Survey reported as follows:

"The Survey * * * stated, in substance, that there was sufficient evidence of a discovery of gas * * * to warrant the inclusion of the N½ section 4 within a known geologic structure of a producing field. This determination, however, was not intended and should not be interpreted to mean that a well had been completed to production, or was in condition to produce, or was capable of production on that date * * *. In fact, the condition of the well on that date was such that gas could not have been produced therefrom * * *." [Omissions not in original.]

It is plain from this report that, immediately prior to the expiration of the primary term of the appellant's lease, there was on the lease neither a producing well nor a well capable of production. [62 I. D., at 87.]

It is quite apparent that the Department has construed the phrase "well capable of producing" to mean a well which is actually in a condition to produce at the particular time in question. This accords with the literal meaning of the phrase and is therefore adopted as the proper meaning of the phrase as used in the automatic termination provision.

The appellants' brief and exhibits were referred to the Geological Survey for its views as to the status of Government Well No. 3. The Survey has reported (on January 28, 1958):

That well No. 3, SE¼SE¼, sec. 8, T. 8. S., R. 103 W., 6th P. M., constitutes a well capable of producing oil or gas in paying quantities is a conclusion of the appellant with which we cannot agree. This well has been drilled to a depth of 3350 feet and oil and gas showings were encountered in the well at

several intervals between depths of 3206 and 3321 feet. Sometime shortly prior to September 3, 1957, a string of 5½" casing was cemented (with 200 sacks of cement) at or near the bottom of the hole. This casing and cement seal off the potential oil or gas bearing strata and until perforated, which has not been done, it would be impossible to produce the well.

The engineering reports and data submitted by the appellants in support of the appeal disclose that there is a possibility of the well being completed as a producer, but it is not alleged that actual production of oil and gas has ever been obtained from the well. It appears in fact that the mechanical condition of the well was such on September 3, 1957, that the well could not have been produced, and there is no evidence that at anytime prior thereto, it was in condition to have been produced.

The facts are not in dispute. The appellants admit that the well casing has not been perforated and that no production test has been made. Exhibits A and B, submitted with the appellants' brief, also sustain the Survey's conclusions. Exhibit A, a core analysis submitted to appellant Mack by Core Laboratories, Inc., on September 9, 1957, analyzed seven formations or intervals and concluded that five had no productive significance. Of the remaining two, the report said:

Formation analyzed from 3206 to 3223 feet exhibits residual liquid saturations which are *indicative of possible* gas production. The observed total water saturations in this interval are higher than would normally be expected for water-free gas production and for this reason, *further testing* of this horizon is recommended. * * *

From 3301 to 3307, formation analyzed exhibits characteristics *indicative of possible* oil production. It is reported that some water was recovered during a drill stem test of this interval, and for this reason *further evaluation* of this zone may be warranted. * * * [Italics added.]

Exhibit B, a letter dated September 13, 1957, to appellant Mack from E. A. Polumbus, Jr., & Associates, consulting petroleum engineers, is addressed to the productive possibilities of Well No. 3. This letter said:

* * * At this time 5½" casing has been set and cemented at 3450 feet. However, the casing has not been perforated. Therefore, our opinion of the productive possibilities of the well is *highly tentative* pending actual production tests.

Examination of the induction log and micro log indicates that the Dakota *may* be productive in the interval 3204 to 3222 feet. * * * It is therefore *entirely possible* that this zone in this well would also be commercially productive *after receiving a fracture treatment*.

Two other zones in the well appear to have productive possibilities. These are in the interval of 3293-3304 and 3311 to 3321. * * * The limited data on these two zones indicate that productive *possibilities* exist.

Until the casing is actually perforated and the well is tested it would be premature at this time to state that the well will be commercially productive. However, the limited information available does indicate that the well could be oil and/or gas productive. [Italics added.]

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This evidence submitted by the appellants themselves conclusively establishes that Well No. 3 was in no condition to produce on or prior to September 3, 1957. Furthermore, the evidence conclusively establishes that by no means could it be said that the potential production that might be possible existed "in paying quantities." There is not the slightest doubt, therefore, that lease 08862 did not on September 3, 1957, have a "well capable of producing oil or gas in paying quantities" which would exempt the lease from the automatic termination provision.

Appellants' assertion with respect to leases 08830 and 08861, on which only dry holes have been drilled, is that they were not subject to the automatic termination provision because they were known, presumably on September 3, 1957, to contain valuable deposits of oil and gas. They contend that such leases can be canceled, under section 31 of the Mineral Leasing Act (*supra*), only by appropriate proceedings in the United States District Court. This is tantamount to an assertion that the automatic termination provision does not apply to leases which are known to contain valuable deposits of oil or gas.

Aside from the fact that there is no evidence other than the appellants' bare assertion to sustain their contention that leases 08830 and 08861 were known to contain valuable deposits of oil or gas on September 3, 1957, there is little to sustain appellants' interpretation of the automatic termination provision. The requirement that leases containing valuable deposits of oil and gas be canceled by judicial proceedings was, of course, in section 31 of the Mineral Leasing Act at the time when the automatic termination provision was added. That provision starts off: "*Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental * * * for any lease on which there is no well capable of producing oil or gas in paying quantities * * **" [italics added]. The opening phrase clearly announces that the automatic termination procedure is to be applicable regardless of the other provisions of section 31, which include the judicial procedure for cancellation. Then the quoted language goes on to state that the automatic cancellation procedure shall apply to *any* lease with the sole exception of leases having wells capable of production in paying quantities. There is no other exception stated, nor is any other indicated by the legislative history of the 1954 act. This Department, therefore, has no basis for reading into the automatic termination provision the exception claimed by the appellants, that of leases containing valuable deposits of oil or gas.

III

The appellants' last major contention is that the Secretary, in the exercise of his discretion, should waive payment of the fourth year's rentals, excuse their late payment, or reinstate the leases. They base their request on the assertion that over \$180,000 have been spent in an exploratory program on the leases, including the drilling of the four wells. There seems to be little doubt that very substantial expenditures have been made on the leases, although it is not shown how much the appellants here have spent.³ The question is whether there is any authority in the Secretary to grant the relief requested.

The appellants refer to section 32 of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 189). This section, which has remained unchanged since its enactment in 1920, authorizes the Secretary to adopt rules and regulations "and to do any and all things necessary to carry out and accomplish the purposes of this Act * * *." This grant of authority in general terms can hardly, I think, overcome the very specific and later enacted automatic termination provision, which is completely self-executing. No action by the Secretary is needed to terminate a lease which is delinquent in rental. The lease is terminated "automatically" by command of the statute. In view of this, it can hardly be said that the Secretary can undo an automatic termination in the exercise of authority "to carry out and accomplish the purposes" of the act.

The appellants also allude to section 39 of the act, as amended (30 U. S. C., 1952 ed., sec. 209), the first sentence of which reads in part as follows:

The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of * * * oil, gas, * * * and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty * * *, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein.

The appellants assume, without discussion, that this provision would authorize the Secretary to waive or suspend retroactively the payment of the fourth year's rental, thereby removing their leases from the applicability of the automatic termination provision.

³ From February 1, 1957, to July 1, 1957, Russell P. Johnson held a $\frac{3}{4}$ undivided interest in the leases. He was also designated as the operator for the purpose of operations on the two tracts in leases 08861 and 08830 on which Government Wells Nos. 1 and 2, respectively, were drilled at a cost of \$33,000 and \$47,000, respectively, during the period from April 5 to May 24, 1957. Government Well No. 3 was commenced on June 26, 1957, and has cost to date \$42,500. Government Well No. 4 was commenced on July 17, 1957, and cost \$4,000. These dates and figures are given in the appellants' brief. Remaining figures include \$16,875 for geological information and studies, \$4,000 for legal and miscellaneous services, and \$30,000 for lease acquisition.

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To my knowledge, the Department has never expressly ruled on the question whether the first sentence of section 39 confers authority on the Secretary to waive, suspend, or reduce rentals which have accrued before any request is made for waiver, suspension, or reduction of the rentals. However, the Department has indicated a doubt that such authority is granted. In *William Ahrens et al.*, 59 I. D. 323 (1946), the applicants for a preference-right oil and gas lease were held to be entitled to apply for a waiver of the first year's rental on the lease pursuant to the first sentence of section 39, which had just been added by the act of August 8, 1946 (60 Stat. 957). The applicants had applied for the lease and a waiver prior to the 1946 act. The Department found it advisable to caution in a footnote to the decision that "There is no question here of the retroactive application of section 39" since, under departmental instructions, any preference-right lease issued to the applicants would bear a future date, consequently any waiver would be of future rental. 59 I. D., at 326, footnote 4. Coming as it did only 3 months after the enactment of the act of August 8, 1946, the *Ahrens* decision (dated November 26, 1946) demonstrates a contemporaneous doubt that the first sentence of section 39 was intended to give the Secretary authority to waive retroactively rentals which had already accrued.

The legislative history of the 1946 amendment of section 39 is of limited significance. It suggests, however, that the Secretary was not intended to be given authority to waive rentals retroactively. The first sentence of section 39 was proposed by the Department in its report of March 15, 1946, on S. 1236, 79th Congress, 2d sess., which became the act of August 8, 1946. The Department referred to the fact that section 17 of the Mineral Leasing Act contained at that time several provisions for waiver, suspension, or reduction of rentals or royalties on oil and gas leases and that section 17 and section 39 contained provisions regarding suspension of operations and production with certain effect on rental payments. The Department therefore recommended that "section 39 be revised to include all of these provisions in one harmonious section to be equally applicable to all oil and gas leases * * *." (S. Rept. 1392, 79th Cong., 2d sess., p. 11.) In the same report (Senate), the Senate Committee on Public Lands and Surveys, which adopted the Department's recommendation with slight changes in language, said: "Section 39 of the Mineral Leasing Act is amended to consolidate in that section the various relief provisions of the existing act, the substance of the existing law being retained with such amendments as are necessary to conform the section to other provisions of the bill." (*Id.*, p. 3.) It is clear from this that the first sentence of section 39 was not intended to increase the

authority of the Secretary with respect to waiver, suspension, or reduction of rentals.⁴

The significance of these expressions of intent as they bear on the question at hand is that prior to August 8, 1946, two special statutes had been enacted providing some measure of relief from accrued rentals. The first was section 2 of the act of July 29, 1942 (56 Stat. 726; 30 U. S. C., 1952 ed., secs. 221-221h note), which authorized the Secretary to make a compromise settlement of any claim for accrued rental under a lease issued pursuant to section 13 of the Mineral Leasing Act where certain circumstances existed. The second statute was the act of November 28, 1943 (30 U. S. C., 1952 ed., sec. 188a), which authorizes the Secretary to accept the surrender of any lease issued under the Mineral Leasing Act where it is filed subsequent to the accrual but before the payment of the annual rental due under the lease, upon the payment of the accrued rental on a pro-rata monthly basis for the portion of the lease year prior to the filing of the surrender.

The Department opposed the enactment of section 2 of the 1942 act, stating that it might have the undesirable effect of encouraging lessees to default in their rental payments in the expectation that a compromise settlement could be effected later. (Letters dated June 10, 1942, from Secretary Ickes to respective chairmen of Senate and House public land committees on H. R. 6071, 77th Cong., 2d sess.) The Department favored the 1943 act, suggesting its final language, apparently on the ground that it was unfair, where a lessee surrendered his lease after the beginning of the lease year, to make him pay the rental for the entire year. (See S. Rept. 208, 78th Cong., 1st sess.)

In view of these two special acts, which authorized the Secretary to grant to certain lessees under certain conditions some measure of relief from accrued rentals, it would seem unrealistic to hold that in enacting the first sentence of section 39 three years later Congress intended to confer sweeping authority on the Secretary not only to reduce but to completely waive accrued rentals. Certainly in the absence of clear language to that effect in section 39 or, at a minimum, a clear expression of such intent in the legislative history of section

⁴ Despite this clear evidence of intention, there seems little doubt that the first sentence of section 39 did broaden the Secretary's authority with respect to the waiver of rentals. As amended by the act of August 21, 1935 (49 Stat. 674), section 17 contained only the following provisions relating to waivers of rentals:

"Such [competitive] leases shall be conditioned * * * upon the payment in advance of a rental to be fixed in the lease * * * which rental except as otherwise herein provided shall not be waived, suspended, or reduced unless and until a valuable deposit of oil or gas shall have been discovered within the lands leased * * *."

"* * * in the case of leases valuable only for the production of gas the Secretary of the Interior upon showing by the lessee that the lease cannot be successfully operated upon such rental or upon the royalty provided in the lease, may waive, suspend, or reduce such rental or reduce such royalty."

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39, there is lacking any reasonable basis for so interpreting the first sentence of that section. Such an interpretation could hardly be reconciled with the statements of both this Department and of the Senate committee that section 39 was merely a consolidation of existing relief provisions, particularly when section 2 of the 1942 act and the 1943 act were not among the acts repealed by section 15 of the 1946 act (60 Stat. 958)⁵ and were therefore deemed to be still applicable in proper cases.

I conclude therefore that the first sentence of section 39, as amended, does not authorize the Secretary of the Interior to waive, suspend, or reduce rental which has already accrued on an oil and gas lease prior to the filing of any application for relief from such rentals.

IV

For the various reasons set forth, I am unable to perceive any acceptable basis under existing law whereby it can be held that the appellants' leases were not subject to the automatic termination provision of section 39. I am also unaware of any sound basis for retroactively waiving or suspending the fourth year's rental on the appellants' leases so as to avoid the applicability of the automatic termination provision to their leases.

Although it is necessary, therefore, to hold that the appellants' leases terminated automatically for their failure to pay the fourth year's rental on time, I note that there has been introduced in the current session [85th Cong., 2d sess.] of Congress a bill (S. 3307) which would, in effect, waive the late payment of the rental and reinstate the leases as of the date of their termination. Until Congress has the opportunity to act on the proposed legislation, it would be premature for this Department to note the termination of the appellants' leases, thereby opening the leased lands to the filing of new oil and gas offers. Consequently, the Bureau of Land Management is instructed not to note the termination of the appellants' leases on the tract book pursuant to 43 CFR, 1956 Supp., 192.161 until further notice.

Subject to this condition, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director of the Bureau of Land Management is affirmed.

ELMER F. BENNETT,
Solicitor.

Approved: March 5, 1958
ROGER ERNST,
Assistant Secretary.

⁵ Section 1 of the 1942 act was among those repealed.

APPEAL OF YORK TABULATING SERVICE, INC.

IBCA-126

Decided March 7, 1958

Contracts: Breach—Contracts: Changes and Extras—Contracts: Damages:
Unliquidated Damages

A claim for additional compensation because of alleged tackiness, incorrect numbering, and poor legibility of aperture cards furnished by the Government to a supply contractor under a contract providing for the establishment of an index of the public land records of the United States that contains "changes" and "extras" articles, but no "changed conditions" article, constitutes a claim for unliquidated damages for breach of contract or misrepresentation, rather than a claim based upon a change in or an addition to the contract, and, therefore, is beyond the jurisdiction of the Board of Contract Appeals to decide.

BOARD OF CONTRACT APPEALS

This determines a motion to dismiss for lack of jurisdiction a timely appeal of the York Tabulating Service, Inc., from the findings of fact and decision of the contracting officer dated July 5, 1957, denying the contractor's claim for additional compensation under Contract No. 14-11-006-4 dated October 13, 1955, with the Bureau of Land Management (referred to subsequently as the "Bureau"). At the request of the appellant a hearing for the purpose of oral argument on the motion was held before the full Board in Washington, D. C., on October 29, 1957.

The contract, which was on U. S. Standard Form 33 (November 1949 edition) and incorporated the General Provisions of U. S. Standard Form 32 (November 1949 edition), provided for the establishment of an index of the documents which control the ownership and use status of the public lands of the United States and their resources. The index was to be composed of tabulating cards which were to be punched, verified, interpreted, sorted, and arranged by appellant. The data to be used in its compilation was in the form of positive microphotographic film images of the public land records of the United States. These microfilms were mounted on tabulating cards which, because the film was set in apertures cut in the cards, were known as aperture cards. The cards were manufactured and the microfilms prepared and mounted on them by other contractors with the Government, and the cards were then turned over to appellant for the further processing required by its contract.

The requirements of the contract governing the work to be done, in so far as relevant to the matters in dispute, may be summarized by saying that appellant was to (1) punch in each aperture card a pattern of holes indicative of the state, meridian, township and range of the land description appearing in the microfilm mounted on that card;

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(2) verify this pattern against the microfilm through a second punching operation; (3) interpret each card by printing on it in words and figures the state, meridian, township and range denoted by the punched holes; and (4) sort and arrange the cards in a prescribed sequence. The contract did not attempt to specify what types or numbers of machines or what types or numbers of procedures appellant should use in order to achieve these results.¹ It was expressly stipulated, however, that the work must be done with 100 percent completeness and accuracy, and also that appellant would bear all costs of replacing aperture cards or microfilms that were damaged, spoiled or defaced while in its custody or control.

The contract was a unit price contract in the sum of \$108,405, which sum was increased slightly as a result of change orders accepted by the appellant. Such orders also extended the completion date specified in the contract until the date when the required services were actually completed.

The appellant seeks, apparently, additional compensation in the total amount of \$58,658 because of the alleged tackiness, incorrect numbering, and poor legibility of the materials which it had to process. These deficiencies, the appellant contends, so disrupted the production-line methods of processing upon which its bid had been predicated as to reduce the performance of the job to what was, in substance, a piece-work method.

A detailed statement of the claim, in an amount slightly larger than is now sought, was presented to the Bureau in a letter dated May 8, 1957.² The letter explained the manner in which the increased production costs alleged to have been incurred had been computed. The cost increase resulted, it asserted, because the aperture cards would not feed properly into the tabulating machines and because the microfilm images mounted in the apertures lacked uniform legibility. These factors were said to have cut production in half, and to have multiplied errors to between six and seven times the normal rate of incidence.

In his findings of fact dated July 5, 1957, the contracting officer denied the claim in its entirety.³ The findings state that "the con-

¹ As originally executed, the contract required appellant to perform operations (1) and (2) on "detail" cards, and then to use those cards as a vehicle for reproducing the same data on the aperture cards. After the job was about 16 percent completed, the requirement for "detail" cards was eliminated, at appellant's suggestion, by Change Order No. 1.

² The appellant had complained of costs and delays beyond its control in previous conferences with Bureau representatives, and in letters dated March 5, 1956, and July 24, 1956, had mentioned the inordinate tackiness of batches of the aperture cards.

³ Two additional items, based on the rendition of services to the Government over and above those specified in the contract, were allowed in the amount of \$758.86 and \$325.00, respectively.

tractor was forewarned and given ample time and opportunity to determine and consider the precise form, format, design, contents, nature, characteristics, clarity, legibility, and readability of the materials, microfilms, and source documents specified by or to be furnished in accordance with the terms, conditions and requirements of the contract"; and that "the contractor was not at any time, under any circumstances, in any manner, misled concerning the nature of the work to be performed and the services to be rendered."

The notice of appeal divides the claim into three categories, and gives an itemization of the additional expenses alleged to have been incurred in connection with each. These categories, together with the findings of the contracting officer that relate specifically to each, will be discussed seriatim.

1. *Tackiness of Aperture Cards*

This portion of the claim is for additional costs, in the amount of \$6,229, due to tackiness brought about by the "bleeding" of the aperture cards, that is, the oozing out of the acetate adhesive used to affix the microfilms in the apertures. Appellant contends that this caused the cards to stick together, and increased their tendency to jam in the tabulating machines. The extra costs claimed are for the resultant diminution in productivity of the machines and their operators, the taking of precautionary measures to minimize jamming, and the repair or replacement of cards and microfilms that were mutilated by the machines. In this last connection appellant asserts that the tackiness of the cards caused the rate of mutilation to exceed by far the rate normally to be anticipated in a tabulating card operation.

There is nothing in the contract which deals expressly with the subject of tackiness. The nearest approach is a provision which says that "aperture mounting conforms to Filmsort specifications,"⁴ but there is nothing in the record to show what those specifications were, although appellant says it was advised by Bureau personnel, prior to bidding, that the Government's contract with Filmsort contained a "no bleeding" provision. The cards themselves, the contract with appellant discloses, were of IBM specifications.

The contracting officer in his findings stated, among other things, that the "bleeding," or tackiness, of the aperture cards was a recognized condition and inherent characteristic of such cards; that the apertures in the cards were cut in the position required for their processing in machines of IBM manufacture and were not positioned in a way that would admit of their maximum effective utilization in

⁴ "Filmsort" is an abbreviation of the name of the firm that did the mounting work for the Government.

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the Remington-Rand machines employed by appellant; that personnel of the Bureau were aware, prior to the issuance of the invitation for bids, that the processing of aperture cards through key-punch machines and other equipment of either IBM or Remington-Rand manufacture would result in a high rate of damage to the cards, either from erroneous punching or machine jamming;⁵ that appellant used for processing the cards equipment of its own design, together with Remington-Rand equipment modified to appellant's specifications, which had not been adequately tested and proven satisfactory prior to the award of the contract; and that, in particular, the direct-reading viewer designed by appellant for the purpose of facilitating production-line processing affected the feeding of the cards and, through the heat generated by its light, could have contributed to the alleged excessive "bleeding." He concluded that appellant, with full awareness of or opportunity to know the circumstances, had accepted a calculated risk that the cards might not feed as well as it thought they would; that damage to them was foreseeable; that the rate of damage was increased by appellant's equipment and mechanics of operation; and that appellant was responsible for replacing the cards damaged or destroyed as a result of its operations.

In rebuttal, the appellant contends that the findings are based upon the premise that "bleeding" is inherent in aperture cards, that the erroneousness of this premise is demonstrated by the alleged fact that the Government's contract with the manufacturer specified that there was to be "no bleeding," and that the other matters mentioned in the findings were either *de minimis* or anticipated in appellant's bid.

2. Incorrect Numbering

This portion of the claim is for additional costs, in the amount of \$2,393, asserted to have been incurred because, when the aperture cards were received by appellant, those for multiple-page documents were not always arranged in the order of pagination of the documents, thus necessitating rearrangement and renumbering of the cards. The specifications described the cards as being "pre-numbered," but said nothing about the sequence in which they would be arranged. The contracting officer found that there were minor errors in the sequential arrangement of some of the cards for multiple-page documents, but that the degree to which this deficiency had affected appellant's operations had not been established.

⁵ The "detail" card procedure, the contracting officer stated, was incorporated in the contract, as originally executed, for the purpose, among others, of minimizing damage to or loss of aperture cards from these causes.

3. *Poor Legibility*

The remainder of the claim is for extra expenses, in the amount of \$51,698,^o attributed to a lack of uniform legibility in the microfilm copies of source documents which were the subject of the contract operations. The appellant argues that its pre-bid investigation of the documents showed only good legibility; that it was assured by Bureau personnel that only qualified penmen were utilized by the Government in the days when such documents were written by hand; that many of the documents did not come up to its reasonable expectation of good legibility; and that in some instances where the original document was readable, the mounted microfilm image was not. The amount claimed includes additional equipment rentals and labor charges due to the time lost by the operators in deciphering documents of poor legibility. It also includes the cost of replacing aperture cards that were erroneously punched, as would be the case when the verifier's reading of a particular word differed from the reading which the operator who made the initial punch had placed on it, a situation that is said to have frequently occurred.

The contract does not deal expressly with the subject of legibility; it merely says that the contractor shall punch into the aperture cards the land description data "as reflected in the microphotographic images of the documents mounted on the aperture tabulating cards." The invitation also declared that "sample tabulating cards and representative copies of the documents involved" would be available for inspection by prospective bidders, and that personnel of the Bureau would be available for consultation.

It appears from the record that when appellant considered a particular image to be so illegible as to be beyond the capacity of its operators to decipher at all, the aperture card involved was turned over to the Bureau, which seemingly proceeded to ferret out the true description and to supply it to appellant. There is no allegation that the contracting officer, or other authorized Government personnel, required appellant to process aperture cards which it would have preferred to return to the Bureau because they involved deciphering problems, even though not completely unreadable.

The findings of fact state that all prospective bidders were given ample opportunity to inspect not only the sample tabulating cards and "representative" copies of documents mentioned in the invitation, but also approximately 90 percent of all the source documents, together

^oThe amounts stated under this and the two preceding headings aggregate \$60,320. Appellant considers, however, that the Government is entitled to certain credits in the sum of \$1,662. Deducting these credits, the total of the claim becomes \$58,658, as previously stated.

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with more than two-thirds of the negative microfilm copies from which the positive images mounted on the aperture cards had been, or were to be, reproduced. The conclusion reached by the contracting officer was that the lack of uniform legibility was a foreseeable condition which appellant should have taken into account in preparing and submitting its bid.

In rebuttal, appellant contends that it did examine the sample tabulating cards and "representative" copies of documents furnished by the Government, and did make a spot check of the source documents, but that this examination and check revealed no problem of legibility.

The amounts itemized for poor legibility appear to represent, in part, expenses incurred by reason of the fact that the special viewer, which appellant had devised for magnifying the microfilm in a way that would admit of its reading being made a production-line operation, would function properly only if the document to be read was positioned in the center of the aperture, whereas the microfilm for many of the multiple-page documents had been cut and mounted in such a manner that the page to be read was positioned at varying distances to the right or left of the aperture center. Indeed, the positioning of the special viewer is made, in the brief filed by the appellant in support of its appeal, a separate category of claim, in addition to the three enumerated in its notice of appeal. The contracting officer did not expressly comment upon this aspect of the claim. His findings on the subject of tackiness indicate, however, that he regarded the lack of adjustability of the viewer, together with other equipment problems, as being a factor that adversely affected the readability of the documents.

The Board has examined all of the allegations made by appellant concerning the reasons for and the amount of the increased costs which it asserts were sustained in the performance of its contract with the Government. These allegations cover not only the three categories of aperture card deficiencies outlined above, but also a number of other problems that arose in connection with the processing of these cards. The Board, however, has been unable to find in the allegations so made any facts which, if proved to be true, would permit the Board to allow any part of the claim brought before the Board by this appeal.

To be entitled to additional compensation in an administrative proceeding of this type, a contractor must be able to point to some provision of the contract that affords a basis for relief. The contract in the present case contains, to be sure, a "changes" article, and an "extras" article.

It is not alleged by the appellant, however, that the contracting officer prescribed any change in any of the features of the required index as described in the contract, or prescribed any change in any of the procedures set out in the contract for the preparation of the index, apart from those changes that were agreed to by appellant through its acceptance of the change orders actually issued. Nor does appellant allege that it was required to perform any work which was not necessary for achievement of the results called for by the applicable contract specifications, or that it was required to correct or redo any work which complied with those specifications.

Appellant does allege that the condition of the aperture cards furnished by the Government, or other circumstances involved in their processing, deviated from the terms of the contract. In this connection, the contention was advanced at the oral argument that it was an inherent, albeit not an express, specification of the contract that the cards would be reasonably legible and readily processable by tabulating machines, and that the failure of the Government to provide cards that measured up to those standards was either a constructive or an actual change in the contract. It is also alleged that the conduct of the Government in the particulars complained of by appellant made its performance of the services called for by the specifications more difficult, or more time-consuming, or more expensive, and resulted in there being more errors to correct, than would have been the case if the aperture cards had been in the shape it anticipated they would be.

None of the matters so alleged, when related to the provisions of the contract here in question, would amount to a change in the contract terms, or to an addition to the contract work. Even if the contract were to be read as including the implied conditions contended for by appellant, the alleged deviations, such as the tackiness of the cards, and their consequences, such as the jamming of the machines, would constitute, at most, hindrances or interferences placed by the Government in the way of appellant's performance of the work. It is well settled that claims for such hindrances or interferences are claims for unliquidated damages for breach of contract, and are not claims for "changes" or "extras."

Much stress is also laid on the alleged unforeseeability of the increased costs that were incurred. It is true that unforeseen costs of a contractor may in certain circumstances be allowed administratively under contracts which contain a "changed conditions" provision. As the contract in the present case is a supply rather than a construction contract, however, it contains no such provision, and hence no relief can be afforded to the appellant on the theory that some of the

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allegedly unanticipated conditions which it encountered constituted "changed conditions."

To the extent to which the claim may also be founded on the view that erroneous information was given to appellant by Government representatives, or that relevant necessary information was withheld, the claim would appear to be one for unliquidated damages caused by alleged misrepresentations of the Government, rather than a claim cognizable under the "changes" or "extras" articles of the contract.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the Government's motion is granted and the appeal is dismissed for lack of jurisdiction.

THEODORE H. HAAS, *Chairman*.

I concur:

HERBERT J. SLAUGHTER, *Member*.

MR. SEAGLE, concurring:

I concur in the result but I should not like to rest the decision to grant the motion to dismiss simply on the ground that all of the many claims of the appellant are for unliquidated damages. There is no more murky field in the law of government contracts than the law relating to claims for unliquidated damages. Many of such claims fall into well-established categories, but these have been determined by rule of thumb. Insofar as a general test of such claims can be said to exist, it seems to turn upon whether the action of the contracting officer can be said to be an act of interference with the contractor's operations rather than an act intended to promote the performance of the contract in which case it would be a change or furnish the basis for an extra. This test is, however, often rather difficult to apply, since it involves an assessment of the intentions of the contracting officer.

It is necessary to consider, for example, only such a case as *W. H. Armstrong and Co. v. United States*, 98 Ct. Cl. 519 (1943), in which the contracting officer, under a contract for the construction of an officers' quarters at Bolling Field, required the contractor to use fire bricks rather than common bricks as specified in the contract with the result that the contractor had to use more mortar and labor at an increased cost. Two of the judges were of the opinion that the contractor had established an extra; two of the judges dissented on the ground that if such was the case the claim would have to be rejected

because of the failure to observe the formal requirements of the extras article of the contract; and one of the judges concurred in the result on the ground that the Government "in refusing to furnish and permit plaintiff to use the brick which it had agreed in writing to furnish, breached the contract as written and became liable for damages and excess costs directly flowing from such breach."

In the present case, if it be assumed that the contract, properly construed, required the Government to furnish the contractor with cards that were entirely legible, free from tackiness and arranged in proper sequence, it is by no means wholly clear that the appellant was not required to perform extra work, for it may be argued that illegible and tacky cards are as dissimilar from cards that are legible and free from tackiness as fire bricks are dissimilar from common bricks. Under such reasoning, the appellant's claim that is based on the faulty sequence of the cards would be particularly bothersome, since the contracting officer in his findings admits "error in the sequential arrangement of multiple page documents," although he has found the defect to be "a minor one."

It seems to me, however, that the contract cannot reasonably be construed to have required the Government to furnish cards free from the alleged defects. It is obvious that the very reason for making the contract was that the public land records of the United States were in a deplorable, if not chaotic state, and hence that the appellant should have expected that a good many of the original documents, as well as the microfilm images of such documents, would be characterized by poor legibility and sequential arrangement. It is true that the specifications described the sample tabulating cards made available for inspection as "representative" but, if they were not, as the appellant seems to allege, the Government would have been guilty of misrepresentation, and a claim based on such misrepresentation would clearly be a claim for unliquidated damages. As for the alleged tackiness of the cards, the Government did not warrant their characteristics. While the specifications required the Government to furnish Filmsort cards, size "c," and stated that aperture mounting conformed to Filmsort specifications, this in itself was not a warranty of absence of tackiness, even if it be assumed that the Filmsort contract specified "no bleeding," as the appellant alleges. The Government, like other buyers, could be disappointed in its expectations, and warranties are not to be lightly implied. In undertaking to prepare the index of the public lands, the appellant agreed to bring order out of chaos to the extent of 100 percent, and to repair any damage to the cards arising in the course of its operations. In making this sort of an agreement, the appellant undertook a heavy

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burden and it cannot now be heard to complain that it should not be held to the letter of its agreement.

Indeed, a common theme running through the presentation of most of the items of the appellant's claim is that its actual costs in the performance of the contract exceeded its estimated costs before bidding, and that it is, therefore, entitled to be reimbursed for any unanticipated expenditures. The Board has twice rejected claims based on such a theory.¹ As the Board said in the first of these cases: "A contractor's total costs may include costs which are in no way attributable to any fault of the Government, or any breach of a contractual obligation by the Government. Even when they include, moreover, claims for damages based on a breach of a contractual obligation of the Government, they may not be considered administratively because they represent claims for unliquidated damages."

It may be that what the appellant is really contending is that even though the contract does not contain any express assurances concerning the tackiness, numbering, order or legibility of the cards that it was subject to a rule of reason which was contravened by the allegedly exceptional difficulties it experienced in the actual performance of the contract. But the Board has held that a claim based on an implied condition of reasonability is a claim for a breach of contract, and hence also a claim for unliquidated damages which is not allowable administratively.²

WILLIAM SEAGLE, *Member*.

AUTHORIZATION FOR BUREAU OF RECLAMATION TO INVESTIGATE PLEASANT VALLEY DEVELOPMENT

Statutory Construction: Generally

The appropriation of funds to finance the completion of the Pleasant Valley investigation is clearly authorized by existing law.

Statutory Construction: Generally—Bureau of Reclamation: Investigations

Section 2 of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U. S. C., sec. 391), section 9 of the Reclamation Project Act of August 4, 1939 (53 Stat. 1187; 43 U. S. C. sec. 485), the Flood Control Act of December 22, 1944 (58 Stat. 887), and intermediate legislation have been considered as authority for the investigation of works having physical and functional purposes either related or not directly related to irrigation.

¹ See *M. Hoard*, IBCA-6 (May 11, 1955), and *S. M. Johnson, Johnson Construction Co.*, IBCA-13 (August 18, 1955).

² See *R. P. Shea*, 62 I. D. 456, 463 (1955).

Statutory Construction: Administrative Construction—Statutory Construction: Legislative History—Appropriations

The statutes have been construed administratively and by the Congress in appropriating funds and authorizing projects as permitting the Interior Department to conduct project investigations for one or more multiple purposes either related or not directly related to irrigation.

M-36505

MARCH 28, 1958.

TO THE COMMISSIONER OF RECLAMATION.

This is in response to your request for a statement of the authority for the Bureau of Reclamation to complete its investigation of a multiple-purpose development at the Pleasant Valley site on the Snake River. This request is prompted, we understand, by questions raised during the House appropriation hearings now in progress.

The question is raised on the assumption that the Pleasant Valley development is not in itself an irrigation project.

It should be emphasized at the outset that the Pleasant Valley development, for which the additional investigation funds are being requested, has not been conceived as an isolated development. Pleasant Valley is more appropriately considered not in isolation but as one unit of a complex of developments for the middle Snake area which together would result in the achievement of multiple purposes including, among others, irrigation, flood control, navigation, power, fish and wildlife, and municipal and industrial water. Neither the Congress nor Secretaries of the Interior in administering the reclamation laws have ever considered that each individual unit under investigation by the Bureau of Reclamation must itself include irrigation as a physical, functional purpose.

Perhaps the most telling example of the inter-relationship of individual units serving separate purposes as a part of an overall reclamation development is the Missouri River Basin Project which was authorized by the Congress in the Flood Control Act of 1944. This authorization followed several years of investigation by the Bureau of Reclamation financed from funds appropriated by the Congress for reclamation investigations in much the same manner as funds are now being sought to complete the investigation of the Pleasant Valley development.

And, of course, the inclusion in projects of power development, the surplus revenues from which serve to assist the water users in the pay-out of irrigation costs has long been regarded as an integral part of irrigation development. E. g., sec. 5, act of April 16, 1906 (34 Stat. 117).

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However, even regarding Pleasant Valley as an isolated project and without considering its relationship to future potential irrigation development there is, in my view, no question as to the authority to investigate such a project. The question of the authority of the Bureau of Reclamation to investigate works that in themselves are not directly related to irrigation has whenever it has arisen been resolved affirmatively.

The question arises no doubt by reason of the use of the term "irrigation" in the original Reclamation Act of 1902. As the concept of resource development has evolved over the years from single purpose to multiple purpose, the Congress has consistently recognized, both through the process of appropriating funds and through direct legislative enactment that the Bureau of Reclamation under the Federal reclamation laws was an appropriate agency to accomplish resource developments of a multiple-purpose character.

For example, the investigations which led to the authorization and construction of Hoover Dam on the lower Colorado River, the first of the really gigantic multiple-purpose projects, were conducted by the Bureau of Reclamation in part under a specific act of Congress (act of May 18, 1920, 41 Stat. 600) authorizing an investigation of plans for irrigation development in the Imperial Valley and at a time when the basic authorizing legislation for Bureau of Reclamation investigations still remained section 2 of the act of June 17, 1902 (32 Stat. 388), with its reference to "irrigation works" and "irrigation projects."

By section 9 of the Reclamation Project Act of 1939 (53 Stat. 1187), the Congress codified in statutory form the concept of multiple-purpose development which had gradually evolved legislatively and administratively in the preceding 37 years since passage of the original Reclamation Act. For intermediate examples of legislative recognition of the concept of multiple-purpose projects under the Bureau of Reclamation prior to enactment of the 1939 act, see the act of August 20, 1935 (49 Stat. 1028, 1039), authorizing Grand Coulee and Parker dams, the latter, like Pleasant Valley having no functional irrigation purpose, and the act of August 20, 1937 (50 Stat. 850), reauthorizing the Central Valley Project.

Section 9 of the 1939 act, as amended by the act of August 14, 1946 (60 Stat. 1080), makes provision for the administrative authorization (without further congressional action) of projects, parts of projects, and individual units embracing one or more of the following purposes: irrigation, flood control, navigation, power, fish and wildlife, and municipal water supply or other miscellaneous purposes.

Within a few years after the passage of the 1939 act, the Secretary, under the administrative authorization process established in

section 9 of the act, authorized the construction of Davis Dam on the lower Colorado River, all of the costs of which were allocated by the Secretary to commercial power. (See H. Doc. 186, 77th Cong., 1st sess.) A point of order was raised in Congress against the first request for funds for Davis Dam. In ruling on that point of order, the Chairman of the Committee of the Whole House said (87 Cong. Rec. 4047) : "The chair has examined Section 9 of the Reclamation Act, approved August 4, 1939, which appears to be adequate authority for the Secretary of the Interior to recommend the project here in question."

It is clear from an examination of the language of section 9 (a) of the 1939 act, as amended by the act of August 14, 1946, that irrigation, power, municipal water supply or other miscellaneous purposes as well as flood control and navigation stand on a par with each other. Since there never has been and could not be any question that this language covers a construction of a single-purpose project for irrigation there can be equally little question that it would cover a project that embraced other purposes but did not include as a part of its physical function the function of irrigation. In addition to the Davis Dam project, to which reference has been made above, there are other instances of administrative authorization of non-irrigation facilities under the procedure of the 1939 act. For example, the Alcova Powerplant (Bureau of Reclamation Project Feasibilities and Authorizations, GPO, 1957 ed., pp. 506-510) and the additional generating capacity at Grand Coulee Dam (H. Doc. 64, 81st Cong., 1st sess.).

The most recent confirmation from a congressional source of the conclusion that reclamation activities may embrace projects which themselves do not include irrigation functional features is to be found in House Report 664, 85th Congress, 1st session. This is the report of the House Committee on Interior and Insular Affairs, reporting out H. R. 2147, a bill to authorize the San Angelo Federal Reclamation Project, which was enacted as Public Law 85-152 (71 Stat. 372). The Committee stated, at page 5 of its report, in speaking of section 9 of the Reclamation Act of 1939, that:

It does not distinguish between single-purpose projects and multi-purpose projects and does not specify what proportion, if any, of the project must be devoted to irrigation. The first project authorized for construction under this act was the Bullshead project (now Davis Dam). Its entire cost was assigned to be returned from power revenues. In ruling on a point of order, the Chairman of the Committee of the Whole House said of this project:

The Chair has examined section 9 of the Reclamation Act, approved August 4, 1939, which appears to be adequate authority for the Secretary of the Interior to recommend the project here in question (87 Congressional Record 4047).

Section 1 of the [San Angelo] bill also designates flood control, the provision of fish and wildlife benefits, recreation, and silt control as purposes of

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the project. Flood control is recognized in section 9, subsections (a) and (b), of the Reclamation Project Act of 1939 as a proper subject for consideration in connection with projects for other purposes under that act. The preservation and propagation of fish and wildlife is covered by the proviso to section 2 of the act of August 14, 1946 (60 Stat. 1080). Recreation has become virtually a standard ingredient in reclamation project authorization acts. (See, for recent instances, the acts of August 12, 1955, 69 Stat. 719 (Trinity River division); February 25, 1956, 70 Stat. 28 (Washita project); April 11, 1956, 70 Stat. 105 (Colorado River storage project); June 4, 1956, 70 Stat. 244 (Wapinitia project); August 1, 1956, 70 Stat. 775 (Washoe project); August 6, 1956, 70 Stat. 1058 (Crooked River project); and August 6, 1956, 70 Stat. 1059 (Little Wood River project)). Mention of silt control in authorizing legislation as a project purpose is comparatively rare but is not unprecedented; see the acts of August 29, 1949 (63 Stat. 677) and December 29, 1950 (64 Stat. 1124) authorizing the Weber Basin and Canadian River projects. It is, in any event, factually true that the present project will assist in silt control.

It has been suggested that by reason of the provisions of section 2 of the Flood Control Act of 1944, reading in part

* * * hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department * * *,

the Bureau of Reclamation is precluded from completing the investigation of Pleasant Valley since one of the purposes under investigation is flood control.

In the context of section 2 from which the foregoing excerpt is taken, it is clear that this language was not intended to bar the Bureau of Reclamation from continuing to investigate and construct multiple-purpose reservoir projects which include flood control among their purposes, a field in which the Bureau had been active for years and was engaged in at the time of the passage of the 1944 act. It was designed, rather, to bar the Department of Agriculture from entering on to the construction of main stream river improvements including storage works. The complete text of section 2 is as follows. The above-quoted portion is italicized in context:

SEC. 2. That the words "flood control" as used in section 1 of the Act of June 22, 1936, shall be construed to include channel and major drainage improvements, and that *hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department* under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

The relationship of the underscored portion to the balance of the sentence in which it is located demonstrates conclusively that the pur-

pose of the Congress was to establish and differentiate between the relative roles of the War Department and the Department of Agriculture in water resource development. It was to distinguish on the one hand between activities on or closely related to streams themselves, which were by that provision denominated "flood control" and placed under the jurisdiction of the War Department, and offstream activities such as investigations of watersheds, measures for runoff, waterflow retardation and soil erosion which were to be under the jurisdiction of the Department of Agriculture. The section has no relationship to the activities of the Department of the Interior. That this is so is, I believe, made even clearer by the fact that in section 9 of the same act, the Congress authorized the Bureau of Reclamation to undertake its portion of the multiple-purpose Missouri River Basin development which portion includes flood control as one of the purposes to be served.

Moreover, since 1944 the Congress has appropriated large sums for investigational work by the Bureau of Reclamation which has covered potential projects providing flood control as well as other purposes, a fact of which the Congress has been aware annually in the appropriation presentations.

It is worth noting, also, in considering the intention of the Congress that the annual appropriations act providing funds for Bureau of Reclamation investigations state that such funds are available, "for engineering and economic investigations of proposed Federal reclamation projects and studies of water conservation and development plans." (For example, see Title II of the Public Works Appropriation Act, 1958.) The phraseology here used is much broader than that which would be employed were it the intent of the Congress to confine the Bureau of Reclamation to works which do not include flood control. In addition, and as above noted, the Pleasant Valley development is not, in any event, a single-purpose flood control structure. Functionally it will serve the multiple purposes of flood control, power, navigation, and fish and wildlife.

Finally, even if it might have been possible, in 1944, to read section 2 of the 1944 act as ousting the Department of the Interior from all investigations touching upon flood control, a reading I could not have concurred in for reasons above stated, the fact is that the statute has not been so read either administratively by the Interior Department (or for that matter by the Corps of Engineers) or by the Congress in appropriating funds and authorizing projects. That long-standing construction must be regarded as controlling. (*Brown v. United States*, 113 U. S. 568 (1885); *Logan v. Davis*, 233 U. S. 613 (1914); *United States v. Jackson et al.*, 280 U. S. 183 (1930); *United States v. Chicago North Shore Railroad Co.*, 288 U. S. 1 (1933).) Particularly

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is that construction to be regarded as controlling when the Congress itself has concurred in such construction through its legislative and appropriative processes.

For the foregoing reasons I am satisfied that the appropriation of funds to finance the completion of the Pleasant Valley investigation is clearly authorized by existing law.

ELMER F. BENNETT,
Solicitor.

APPEAL OF DUNCAN CONSTRUCTION COMPANY

IBCA-91

Decided April 2, 1958

Contracts: Appeals—Contracts: Substantial Evidence

A factual statement by a contractor in a notice of appeal is a mere allegation of what the contractor asserts to be the facts, and, if disputed by the Government, cannot be accepted as proof that the facts so asserted are true.

Contracts: Appeals—Contracts: Substantial Evidence

In an appeal attacking the validity of a finding of fact or decision by a contracting officer, not patently erroneous, it is incumbent upon a contractor who advances a claim against the Government that was denied by such finding or decision to come forward with evidence showing error therein, and in the absence of such evidence the Board of Contract Appeals cannot properly overrule the decision of the contracting officer. In such a case, the burden of the appeal is upon the contractor's shoulders, and that burden calls for evidence on the contractor's side to show that the action taken by the contracting officer was erroneous, for the findings of a contracting officer are presumed to be correct in the absence of proof to the contrary.

Contracts: Interpretation—Contracts: Specifications

Where a contract contains separate unit bid prices for the puddling and for the compaction of backfill, and contains specifications which limit puddling to backfill that is composed of silty material and require compaction for backfill that is composed of sand or gravel, a provision in the contract which authorizes the contracting officer to direct that unsuitable foundation material be removed and replaced with selected material and which states that the puddling or compaction of such refill material shall be paid for at the unit bid price for the puddling or compaction of backfill, as the case may be, is to be interpreted as calling for the compaction, rather than the puddling, of refill material that is composed of sand and gravel.

BOARD OF CONTRACT APPEALS

This is a timely appeal by the Duncan Construction Company, Moses Lake, Washington, from a findings of fact and decision by the contracting officer dated September 5, 1956, which denied its claim

for additional compensation arising out of its performance of Contract No. 14-06-116-5035. The contract, in the original amount of \$23,926.50, was dated January 31, 1956; was on Standard Form 23 (revised March 1953); and incorporated the General Provisions of Standard Form 23A (March 1953). The contract work covered the Siphon Alterations Lateral EL20M—East Low Canal Laterals, Block 40, as described in Specifications No. 117C-351, Columbia Basin Project, Washington. All work was completed and accepted on May 1, 1956, which was within the contract time.

No hearing was requested nor held.

The contractor's claim in the total amount of \$870.75 for additional excavation and compacting filter material is based on three items, which were excepted from the contractor's release on contract dated May 28, 1956. Each item of the claim is discussed separately below.

Claim Item (a)

*Excavation of open drain ditch next to dissipator pool,
168.2 yds. @ \$2.00 = \$336.40 claimed*

In order to remove the ground water from the site of the dissipator and stilling-pool structure by gravity the contractor cut an open temporary drain ditch between the upstream end of the structure site at Station 4+55 and a point approximately 18 feet north in the bottom of an existing open permanent drain ditch parrelling Lateral EL20M. To drain properly the water through the temporary ditch, it was necessary to deepen the existing open ditch for a distance of approximately 200 feet downstream from its connection with the temporary drain.

It appears from the contracting officer's findings that this work was undertaken by the contractor, without direction by the contracting officer or any of his representatives, for the purpose of removing the ground water at the structure site, which was the contractor's responsibility. The contracting officer subsequently decided that the temporary drain ditch should be converted to a permanent French-type drain in order to provide a positive means for the escape of ground water expected to accumulate around the dissipator structure. He accordingly directed the contractor to fill the approximately eighteen feet of newly-cut open temporary drain ditch to a depth of approximately two feet with selected sand-gravel filter material similar to and continuous with the materials placed around the dissipator structure. The record indicates that the contractor was paid \$115 for the excavation of the temporary drain ditch, that is, for 57.5 cubic yards at the rate of \$2 per cubic yard, under Bid Schedule Item No. 1, "Excavation for structures," and was paid \$5.26 for placing

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the sand-gravel filter material in the temporary ditch, that is, for 26.3 cubic yards at the rate of 0.20¢ per cubic yard under Bid Schedule Item No. 2, "Backfill about structures." In addition, 26.3 cubic yard miles of overhaul, for hauling the select sand-gravel filter material, was paid for on Purchase Order No. 36,789, the price of which is not disclosed in the record before the Board.

The contractor does not claim that the contracting officer directed it to provide the temporary drain ditch or deepen the existing open ditch, but claims that 168.2 yards (obviously cubic yards) of material was excavated and that, while the contractor wanted to fill the temporary drain ditch in order to facilitate the placing of backfill around the dissipator structure, it was not permitted to do so by the contracting officer. That, the contractor claims, caused a heavy cost to it for which it should be reimbursed on the basis of 168.2 cubic yards of excavation @ \$2 per cubic yard or \$336.40.

The contracting officer dismissed the contractor's claim by the following statement: "Any additional work performed by the contractor to dewater this area was for his convenience and in accordance with the provisions of Specifications subparagraph 30 (c)."¹

The statements contained in the contractor's Notice of Appeal were commented on by the Construction Engineer in a memorandum dated November 29, 1956, to the Project Manager, who was the contracting officer. After referring to the fact that the contractor had been paid for 57.5 cubic yards of excavation and 26.3 cubic yards of backfill, the Construction Engineer stated:

* * * These quantities are supported by field data and office computations which are on file in the Division Office. There is no basis for the contractor's claim for 168.2 cubic yards of excavation from the temporary connecting drain ditch since no such amount of material was moved.

He then went on to explain that the 57.5 cubic yards of excavation paid for did not include any work done by the contractor in deepening the existing open ditch with which the newly-constructed drain ditch connected.

In the same memorandum but commenting on the cost of backfilling around the dissipator structure the Construction Engineer stated:

Utilizing the temporary drain as a permanent french drain did not hamper the contractor in his operations. Due to the terrain and ground-water conditions,

¹ "30. *Classification of excavation.* * * * (c) Payment.—Insofar as practicable, the material moved in excavation for structures shall be used for backfill, otherwise it shall be wasted as directed by the contracting officer. Payment for excavation for structures will be made at the unit price per cubic yard bid therefor in the schedule. The unit price bid in the schedule for excavation for structures shall include the cost of all labor and materials for cofferdams and other temporary construction, of all pumping and unwatering, of all other work necessary to maintain the excavations in good order during construction, of removing such temporary construction, where required, and shall include the cost of disposal of the excavated material."

he was obliged to work from the side of the structure opposite the existing open drain.

The contractor has not come forth with any evidence to overcome the findings of the contracting officer. In particular, it has not shown that the excavation which forms the subject of Item (a) was ordered by any authorized agent of the Government, or that such excavation was in excess of the "work necessary to maintain the excavations in good order during construction" mentioned in subparagraph 30 (c) of the specifications, or that 168.2 yards of material was actually excavated, or that the costs incurred by reason of the contracting officer's decision to convert the temporary ditch into a permanent French-type drain exceeded the sums allowed on account of his decision. In fact the contractor has submitted no evidence at all to the Board bearing on this item of the claim. The Notice of Appeal contains the only statement of record made by the contractor concerning the erroneousness of the findings of fact.² That statement, standing alone, is a mere allegation of what the contractor asserts to be the facts, and, being disputed by the Government, cannot be accepted as proof that the facts so asserted are true.³

In an appeal attacking the validity of a finding of fact or decision by a contracting officer, not patently erroneous, it is incumbent upon a contractor who advances a claim against the Government that was denied by such finding or decision to come forward with evidence showing error therein, and in the absence of such evidence this Board cannot properly overrule the decision of the contracting officer.⁴ The contractor here involved, having based its appeal merely on its unsworn written allegations, apparently does not appreciate the fact that this Board must rely upon the evidence, whether of record, or by testimony, offered by the parties in support of their claims in order to arrive at a decision.⁵ The burden of this appeal is upon the contractor's shoulders, and that burden calls for evidence on the contractor's side to show that the action taken by the contracting officer was erroneous; and it is not sufficient merely for the contractor to say

² "Findings of fact on claim item (a) are erroneous because the contractor wanted to fill the ditch next to the dissipator so he could get to the structure to backfill same. The contracting officer would not allow this because it would shut off the flow of water from the french drain. This ditch excavated by the contractor with 168.2 yds. of material was a direct cost to him at that time and another heavy cost when he wasn't able to fill it to get back to the structure. Inasmuch as the contractor only had to dewater the structure during construction, payment should be made for permanent dewatering."

³ *AAA Construction Company*, 64 I. D. 440 (1957); *Montgomery Construction Company*, ASBCA No. 2556 (January 23, 1956); *R. J. Couvillion*, ASBCA No. 1621 (September 17, 1953).

⁴ *Gila Construction Company, Inc.*, IBCA-48 (December 20, 1955); *Lowdermilk Brothers*, IBCA-10 (February 11, 1955); *A. E. Ratner Chemical Co.*, ASBCA No. 474, 5 CCF par. 61113 (September 29, 1950).

⁵ *J. Sklar Mfg. Co.*, ASBCA No. 1671 (January 12, 1954).

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the action was not proper, for such a contention should be supported by proof giving some explanation of just why it was an error. In the absence of such proof the Board must accept the record, together with any testimony submitted by the Government, as being correct, unless it, on its face, shows error or that it is unbelievable.⁶ While the record pertaining to this item of the claim stems from oral understandings on both sides, and, as such, is not of any great value to the Board in reaching its decision, the findings of the contracting officer must be presumed to be correct in the absence of proof to the contrary.⁷

While it appears to the Board that a change in the drawings and specifications, within the meaning of Clause 3 of the General Provisions of the contract, was made when the contractor was directed to fill in the temporary drain ditch with two feet of selected sand-gravel filter material, it is not necessary to decide that point, since, irrespective of whether this direction amounted to a change, the contracting officer's findings of fact and decision in respect to this item of the claim must be affirmed because of the contractor's failure to submit any evidence to support its claim.

Claim Item (b)

*Compacting filter material under pipeline, 394.3 cu. yds. @ \$0.50=
\$197.15 claimed*

During construction it was found that the subgrade materials in the bottom of the concrete pipe trench were not suitable for a foundation for the pipe. The contractor was directed to remove the unsuitable materials and refill with selected sand-gravel material to a depth of two feet, pursuant to subparagraph 34 (a) of the specifications.⁸

The contracting officer found that the contractor was directed to remove the unsuitable material in the bottom of the concrete pipe trench, and to refill it with selected material, and to consolidate the backfill by puddling methods; that puddling was considered the most suitable and economic type of consolidation since the trench was discharging ground water and the select backfill was a sand-gravel material; that the select backfill was placed by direct dumping from trucks, was not adequately saturated with water and no spading, rodding or other

⁶ *Ibid.*

⁷ *Central Wrecking Corporation*, 64 I. D. 145 (1957); *A. G. McKinnon*, 62 I. D. 164 (1955).

⁸ "34. *Excavation, backfill, and compacting or puddling backfill in concrete-pipe trench.*

"(a) * * * *Provided*, That, if the material in the bottom of the trench is not suitable, as determined by the contracting officer, for a foundation for the pipe, the unsuitable material shall be removed to a depth as directed. The material removed below the bottom of the pipe shall be replaced with selected material compacted in an approved manner.

"* * * Payment for required compaction or puddling will be made at the applicable unit price bid in the schedule for compacting backfill in concrete-pipe trench or for puddling backfill in concrete-pipe trench. * * *

means of agitation was employed; that this resulted in an improperly consolidated backfill which was rejected as not meeting the specification requirements for puddled backfill set out in subparagraph 34 (d); that the contractor was told that the backfill must be replaced or reworked to meet the specification requirements for puddled backfill; and that proper consolidation was achieved by vibrating until consolidation was comparable to that which would have resulted from thorough puddling. The work was then accepted and paid for under Bid Schedule Item No. 6, "Puddling backfill in concrete-pipe trench," at the unit price of \$1.50 per cubic yard for 394.3 cubic yards, or a total of \$591.45.

The contractor contends that it placed the selected material in the ditch as it was told it could; that the material was dumped in piles from 6 feet to 10 feet apart in running water and then shoveled by hand into the pools of water that immediately appeared between the piles; that the more it was rammed and rodded the more mushy the material became; and that the contractor was then advised that a vibrator would probably be necessary to consolidate the material. Since there was no item in the Bid Schedule for consolidating gravelly material, as such, and since only silty material was specified for puddling in subparagraph 34 (d) ^o of the specifications, the contractor argues that payment should have been made under Bid Schedule Item No. 5, "Compacting backfill in concrete-pipe trench," at the unit price of \$2.00 per cubic yard for 394.3 cubic yards, or a total of \$788.60, thus leaving a difference of \$197.15 between the amount allowed and the amount claimed.

The record contains a memorandum from the contracting officer to the Department Counsel, dated January 7, 1957, which states that the vibration of the selected material was required by Government personnel, but that the vibration was necessary only because the puddling had been done in a manner that did not conform to the specifications.

The quantity, 394.3 cu. yds., of selected backfill material involved is not in dispute. The only matter in dispute is the Bid Schedule Item under which payment for the consolidation of this material was made. The contracting officer determined that it should be paid for under Bid Schedule Item No. 6, "Puddling backfill in concrete-pipe trench," at the unit bid price of \$1.50 per cu. yd. The contractor contends that

^o "34. *Excavation, backfill, and compacting or puddling backfill in concrete-pipe trench.*

"(d) Puddling backfill in concrete-pipe trench.—If only fine silty soils are available for backfilling the pipe trench the requirements specified for compacting of backfill are changed to puddling of backfill: *Provided*, That the slope of the trench is such that puddling is practicable and is directed by the contracting officer.

"The material used for puddling backfill shall be silty material approved by the contracting officer. The material shall contain no stones larger than 3 inches in diameter and shall be obtained from required excavation or approved borrow pits. The contractor shall furnish the water required for puddling."

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payment should have been made under Bid Schedule Item No. 5, "Compacting backfill in concrete-pipe trench," at the unit bid price of \$2.00 per cu. yd.

Paragraph 34 of the specifications outlines two methods for backfilling in a concrete-pipe trench. Subparagraph (d)¹⁰ covers the puddling method, which is limited to silty material by the following sentence of the specifications: "The material used for puddling backfill shall be *silty* material approved by the contracting officer" [italics supplied]. Subparagraph (c)¹¹ covers the compacting method, which is further spelled out in Paragraph 35 of the specifications. Subparagraph (c)¹² of the latter paragraph covers the compacting of cohesionless free-draining materials such as sands and gravels, and provides that compaction of the materials may be performed by various means, including vibrators.

Sand-gravel was the very material the contractor was required to place in the concrete-pipe trench. To be sure it was not originally placed and distributed in the trench as specified, but the contractor did ultimately consolidate it to a suitable condition and it was accepted by the contracting officer. While the contractor has not come forth with any evidence to support its position in respect to this item of the claim, it is the Board's opinion that such evidence was not necessary because the specifications are clear as to what should have been required and the Bid Schedule is clear as to the item under which payment should have been made, depending on the material involved.¹³

The position of the Government with respect to the meaning of the specifications appears to be that the provision of subparagraph

¹⁰ *Ibid.*

¹¹ "34. *Excavation, backfill, and compacting or puddling backfill in concrete-pipe trench.*

"(c) *Compacting backfill in concrete-pipe trench.*—Backfill material about the concrete pipe shall be compacted to a height of $\frac{3}{4}$ of the outside diameter above the bottom of the pipe. Backfill to be compacted shall be placed, moistened, and compacted in accordance with the requirements of Paragraph 35. Compacting shall be performed concurrently on both sides of the pipe. The material used for backfill to be compacted shall be approved selected material containing no stones more than 3 inches in diameter, obtained from required excavation or from borrow pits. To prevent unequal loading and displacement of the pipe the backfill shall be placed and compacted in layers having essentially the same top elevation on each side of the barrel."

¹² "35. *Compacting earth materials.*

"(c) *Compacting cohesionless free-draining materials.*—Where compacting of cohesionless free-draining materials, such as sands and gravels, is required, the materials shall be deposited in horizontal layers and compacted to the relative density specified below.

"The thickness of the horizontal layers after compaction shall not be more than 6 inches if compaction is performed by tampers or rollers, not more than 12 inches if compaction is performed by treads of crawler-type tractors, surface vibrators, or similar equipment, and not more than the penetrating depth of the vibrator if compaction is performed by internal vibrators.

"The relative density of the compacted material shall be not less than 70 percent as determined by the standard Bureau of Reclamation relative density tests for cohesionless free-draining soils."

¹³ See Note 4, *supra*.

34 (d) which confines the use of the puddling method to silty material is applicable only to "backfill"; that refill material placed in the bottom of a pipe trench to replace unsuitable material is not "backfill"; and that the contracting officer was, therefore, free to deviate from subparagraph 34 (d) in determining the method to be used in consolidating refill material placed pursuant to subparagraph 34 (a). The last-mentioned subparagraph states, however, that payment for "required compaction or puddling" of refill material is to be made at the unit bid price for the compaction or puddling, as the case may be, of the "backfill" in the pipe trench.¹⁴ Application of subparagraph 34 (a) thus necessitates resort to subparagraph 34 (d), and likewise subparagraph 34 (c), because these are the provisions of the contract which define what it is that is to be paid for as puddling and what it is that is to be paid for as compaction. Indeed, this relationship of the provisions in question was recognized by the contracting officer since, as has been stated, he found that the initial placement of the refill material was rejected because such placement did not meet the requirements of subparagraph 34 (d). The Board thinks it is clear that subparagraph 34 (a) must be read in the light of the other provisions of the contract that deal with the consolidation of earth materials, particularly subparagraphs 34 (c) and 34 (d), and that, when so read, it calls for the compaction, rather than the puddling, of sand-gravel material used to replace unsuitable material at the bottom of a pipe trench. In view of what appears to be the clear intent of the specifications in this particular, it is most difficult for the Board to understand the logic used by the contracting officer in applying the "puddling" rather than the "compacting" unit bid price in making payment for the consolidation of the selected sand-gravel material. The Board finds that the contracting officer's findings of fact and decision on this item of the claim are patently erroneous and therefore the Board is required to overrule them.¹⁵ The contractor is therefore entitled to payment at the unit price of \$2.00, rather than \$1.50 per cu. yd., for the 394.3 cu. yds. of backfill involved or an additional \$197.15 on this item of the claim.

Claim Item No. (c)

*Compacting filter material around dissipator pool, 84.3 yds. @
\$4.00-\$337.20*

Prior to the start of structure backfill the contractor was instructed to place sand-gravel backfill around the wall of the dissipator and

¹⁴ See Note 8, *supra*.

¹⁵ See Note 4, *supra*.

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stilling-pool structure to certain prescribed lines and grades to provide for free discharge of ground water.

The Contracting Officer found that the contractor was advised, before placing this backfill material, that its compaction was neither necessary nor desirable and that no payment would be made therefor; that the contractor nevertheless insisted on compacting the backfill; that during the placing operation it made a token compaction effort, by running an AC-5 crawler tractor over the material several times, which was not in accordance with the specification requirements for compacted backfill; and that no protest or request for written instructions was addressed to any Government personnel as provided for under paragraph 9 of the specifications.

The contractor claims that the backfill was done in accordance with subparagraph 35 (c)¹⁶ of the specifications, and that it did protest.¹⁷ This item of the contractor's claim, like Item (a), is not supported by any evidence.

Subparagraph 33 (b) of the specifications provided for the compaction, to certain lines and slopes, of the backfill about the dissipator structure "unless otherwise shown on the drawings or *directed*" [italics supplied]. The direction to delete compaction, which the contractor concedes it received, appears to have been based on this provision. If so, the contractor's action in attempting to compact the backfill was a breach of its own contractual obligations, for which no payment would be due it under the contract.

Even if this were not the case, the contractor has not proved any facts which would entitle it to compensation for the alleged compaction of the backfill. The only statement made by the contractor regarding the incorrectness of the contracting officer's decision is contained in the Notice of Appeal.¹⁸ There is no evidence that the backfill was compacted in a manner and to a degree that met the density and other requirements of subparagraph 35 (c), and no evidence of any fact that conceivably might justify the contractor's failure to comply with the direction to delete compaction.

As stated under item (a) the mere assertion of an allegation cannot be accepted as proof of the correctness of the allegation,¹⁹ and when a contracting officer's findings of fact are attacked on appeal the burden

¹⁶ See Note 12, *supra*.

¹⁷ "Findings of fact on claim item (c) are erroneous because the contractor did compact this material according to the specifications, Paragraph 35, sub-paragraph c (if compaction is performed by treads of crawler-type tractor). He also did protest when he was directed to delete this item as you have admitted in Paragraph 13 in findings of fact and then contradicted in the next paragraph (No. 14). The contracting officer did not make any changes in accordance with Paragraph 3 of the General Provisions."

¹⁸ *Ibid*.

¹⁹ See Note 3, *supra*.

of showing that an error was made rests, in a case such as this, upon the contractor.²⁰ Since the contractor has not produced any evidence to show that the substance of its claim is meritorious, the Board must affirm the contracting officer's findings of fact and decision on Item (a), irrespective of whether there was a compliance with the protest provision.²¹

Conclusion

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision by the contracting officer dated September 5, 1956, are affirmed as to items (a) and (c) and reversed as to item (b).

ARTHUR O. ALLEN, *Alternate Member.*

We concur:

THEODORE H. HAAS, *Chairman.*

HERBERT J. SLAUGHTER, *Member.*

²⁰ See Note 4, *supra*.

²¹ See Note 7, *supra*.

March 28, 1958

DAY MINES, INC.

A-27553

Decided March 28, 1958*

**Mining Claims: Lands Subject to—Mining Claims: Withdrawn Lands—
Withdrawals and Reservations: Power Sites**

Prior to passage of the act of August 11, 1955, lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to passage of the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Day Mines, Inc., has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated July 31, 1957, which affirmed the decision of the manager of the Boise, Idaho, land office, dated March 2, 1956, declaring null and void 13 lode mining claims designated as Castle Nos. 1 to 6, inclusive, Nos. 9 and 10, and Placer King Nos. 5, 6, 7, 9, and 10.

In his decision the Director stated that the mining claims involved were located at various dates in 1947, 1948, and 1949 on land described by metes and bounds in sec. 3, T. 47 N., R. 4 E., Boise, Meridian, Idaho; that location notices were recorded in the office of the county recorder of Shoshone County, Idaho; that on February 27, 1956, the appellant filed photostatic copies of the location notices and of the proofs of labor in the Boise land office of the Bureau under the provisions of section 4 of the act of August 11, 1955 (30 U. S. C., 1952 ed., Supp. IV, sec. 623); that the land on which the locations were made had been reserved from entry, location, or other disposal under section 24 of the Federal Power Act (16 U. S. C., 1952 ed., sec. 818) on July 10, 1928; that the manager declared the claims null and void on the grounds (1) that mining claims located on land after the land has been withdrawn for power purposes and prior to the effective date of the act of August 11, 1955, *supra*, are invalid, and (2) that such invalid mining claims are not subject to the provisions of the act of August 11, 1955.

It appears from the record that there is no dispute as to the facts in the case, i. e., that the locations were made in 1947, 1948, and 1949, at a time when the land on which the locations were made had been withdrawn from location. Instead, the appellant contends that the Director misconstrued the provisions of the act of August 11, 1955, in

*Not in chronological order.

that the locations made on the land involved after the withdrawal but prior to passage of the act do come within the provisions of the act and were validated by the act.

The appellant's contention is that section 4 of the 1955 act provides that all unpatented mining claims shall be filed for record with United States district land office "within one year after the effective date of this act [August 11, 1955], as to any or all locations heretofore made" and a statement as to the assessment work done or improvements made during the previous assessment year, and that it has done this; that as section 4 provides that "locations heretofore made" come within the act, and section 5 (30 U. S. C., 1952 ed., Supp. IV, sec. 624) excludes all locations made prior to the date of withdrawal or reservation from the provisions of the act, the Bureau was in error in holding that claims located subsequent to a withdrawal or reservation but prior to the date of the act, did not come under the provisions of the act; that all power-site withdrawals or reservations are made subject to existing mineral rights, so section 4, in using the language "locations heretofore made," could only have reference to locations made subsequent to a withdrawal or reservation, but prior to the date of the act; and, finally, that the Bureau was in error in referring to the intent of Congress as the statute is not ambiguous, uncertain or unintelligible and sections 4 and 5 are plain, clear and concise, and the congressional intent is entirely immaterial.

The arguments advanced in this appeal to the Secretary are identical to those presented before the Director. I have carefully examined the decision of the Director and I conclude that the answers given to these same arguments by the Director are correct and fully answer the appellant's contentions.

It need only be added that section 2 of the act of August 11, 1955 (30 U. S. C., 1952 ed. Supp. IV, sec. 621), provides in part as follows:

Sec. 2. All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes: * * *.

This section operates to open lands in power sites to mining location only prospectively, i. e., from the effective date of the act. It does not purport to open power sites retroactively to mining location before the effective date of the act.

The purpose of the act is perhaps best explained in the report of the Department to the Chairman, Senate Committee on Interior and Insular Affairs, dated July 18, 1955, on the bill, H. R. 100, [84th Cong., 1st sess.] which was subsequently enacted as the act of August 11, 1955. In this report it was stated:

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This bill would open lands withdrawn or reserved for power development or power sites to entry for location and patent of mining claims. Use of the land for power development and other purposes would be protected by various specific provisions which reserve power rights to the United States, relieve the United States of liability for damage to mining property because of the later use of the lands for power development, limit the use of the surface of an unpatented mining claim to mining purposes only, and require the filing for recordation in the United States district land office of mining claims located under the bill and of annual assessment work statements.

The purpose of the bill is, apparently, to remove the prohibition, which at present exists, against mining locations under the general mining laws (30 U. S. C., sec. 21 et seq.) where the lands involved are affected by a power site withdrawal or reservation. * * *

Under existing law, lands withdrawn or reserved for power development or power sites may be restored to entry and location under the mining laws whenever their value for power purposes would not be injured or destroyed as a result of such restoration (sec. 24 of the act of June 10, 1920, as amended, 16 U. S. C., sec. 818), and, under existing procedure, the Federal Power Commission, as well as this Department, considers each proposed restoration individually on its own merits. The bill would eliminate the necessity for individual consideration of the facts warranting restoration in each particular case.

Senate Report No. 1150 [84th Cong., 1st sess.] confirms the above statement of the purposes of the proposed act by the following language:

* * * Section 2 operates to open to entry under Federal mining laws public lands presently withdrawn or reserved for power development or power sites; public lands so withdrawn and reserved in the future would be subject also to entry under the conditions provided for in the act.

In reference to the language in section 4 of the act upon which the appellant bases its contention that mining claims located in power-site withdrawals before the date of the act are covered by the act, the Senate report—as was stated in the Director's decision—reads as follows:

Section 4 establishes recording and assessment reporting requirements for unpatented mining claim locations made prior to the effective date of this act and recording and assessment reporting requirements for locations which might be made after the date of the act.

In adopting the following language—

The owner of any unpatented mining claim located on land described in section 2 * * * as to any or all locations heretofore made—

it should be understood that this language refers to claims based on valid entry; for example, where a locator has made entry prior to the withdrawal or reservation for power-site purposes of the lands entered.

In short, *the language of H. R. 100 as reported by the committee does not validate locations or claims based on entry after public lands have been withdrawn or reserved for power development and prior to restoration.* [Italics supplied. U. S. Cong. and Adm. News, Vol. 2, p. 3006.]

The legislative history of the act further shows that there was no discussion of any intention that the bill should validate any mining claims made subsequent to a withdrawal of the lands involved and prior to passage of the act.

Under the circumstances, it is abundantly clear that the act does not cover the appellant's claims, and that those claims are null and void.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

WINCHESTER LAND AND CATTLE COMPANY ET AL.

A-27546

Decided April 8, 1958

Grazing Leases: Preference Right Applicants

In order to be entitled to a preference right to a grazing lease under section 15 of the Taylor Grazing Act, one need not be engaged in the livestock business or derive his principal source of income from raising livestock. However, whether one is primarily or exclusively engaged in the livestock business is a factor which can be considered in making an award of leases between two preference-right applicants.

Grazing Leases: Preference Right Applicants

A preference-right applicant for a lease under section 15 of the Taylor Grazing Act must show that he needs the public land applied for to enable him to make proper use of his contiguous land; thus where an applicant owns land contiguous to public land applied for and uses both for summer grazing, he cannot claim a preference right on the ground that he needs the public land to complement his operations on winter lands which are also owned by him but which are not contiguous to the public land.

Grazing Leases: Preference Right Applicants—Grazing Leases: Apportionment of Land

Where two contending preference-right applicants have not shown that they need the public land applied for in order to enable them to make proper use of their contiguous lands, an award is to be made between them as though they were not preference-right applicants.

Grazing Leases: Preference Right Applicants—Grazing Leases: Apportionment of Land

As between contending applicants for section 15 leases who own contiguous lands, an award must be made to the one who has greater need of the public land to permit proper use of his contiguous land. If only one of the applicants owns adjoining land, an award must be made to him if he needs the public land for proper use of his contiguous land even though

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another applicant may have a greater need for the public land. If none of the contending applicants owns contiguous land, an award is to be made between them on the basis of such factors as their need for the land and proper range management practices.

Grazing Leases: Preference Right Applicants

Where the case files contain insufficient factual information upon which to make an award of public land between two contending preference-right applicants, the case will be remanded to the Bureau of Land Management for a further investigation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Winchester Land and Cattle Company and Albert Winchester have appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated August 21, 1957, which affirmed the decision of the district range manager, Lander, Wyoming, dated February 27, 1957, which rejected the company's application for the renewal of its grazing lease Cheyenne 060049, issued under section 15 of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315m), insofar as the N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 4, T. 42 N., R. 107 W., 6th P. M., Wyoming, is concerned and awarded that land to Dale Wedge pursuant to his application, Cheyenne 067046, filed August 14, 1956, for 440 acres of land.¹

In his decision the range manager pointed out that the appellants and Wedge had been unable to reach any agreement as to a division of the lands involved in their conflicting applications; that both parties are owners of contiguous lands and are therefore preference-right applicants (43 CFR 160.3 (a)); that the Secretary has held that if both applicants have equal preference rights the Bureau of Land Management must render a decision on the basis of the land use pattern, the equities of the applicants, the comparative ability of the applicants to utilize the range under proper range management practices, the amount of Federal range that is necessary to permit proper use of the preference-right applicants' base land and any other factors which are pertinent to the purposes of the Taylor Grazing Act; that the base lands of both applicants are situated and watered in a manner that both can effectively utilize the range under proper range management practice; and that the contiguous base lands of both applicants are suitable only for summer grazing.

The range manager then stated:

Winchesters have at a lower elevation an extensive hay ranch where the cattle are wintered while Wedge buys stock in the spring, summers them on base lands along with the public domain and sells in the fall. In an operation such as the

¹ All of the 440 acres were included in the appellants' lease and all but the N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 4 were included in the renewal granted by the range manager.

one of Mr. Wedge's an applicant's need could never be confined or limited, while a year-round operation is either limited by its summer or winter feed or forage supplies, in this manner the deficiencies are the need for Federal Range to permit proper use of the base land. Mr. Wedge has plans for improvements whereby hay production would be possible and facilitate a year-round operation.

Even with some hay production Mr. Wedge will no doubt remain deficient in winter forage in comparison to summer supplies.

The range manager thereupon rejected Wedge's application for 360 acres and allowed it for the 80 acres involved in this appeal.

In their appeal to the Director the appellants specified numerous errors in the manager's decision, the more important of which are as follows:

1. That the decision hinders the stabilization of the livestock industry dependent upon the public range and encourages speculative use of the range.
2. That Wedge is not engaged in the livestock business; that he does not depend on his livestock operation as his sole means of support, but is regularly employed in another business in the town of Dubois, Wyoming, and as a dude wrangler in hunting and fishing expeditions.
3. That the manager's decision ignores the equities existing between the applicants, the comparative ability to utilize the range under proper range management practices, and the amount of federal range that is necessary to permit the proper use of the respective applicant's base lands.

In addition to the above allegations the appellants also submitted on May 1, 1957, as a reason for its appeal, evidence that on April 12, 1957, Wedge listed both his base lands and his leased lands for sale. The appellants contended that this fact is unequivocal evidence that Wedge's stated reasons for the need of additional lands were not made in good faith, and that the sole purpose of his application was to obtain additional land to enhance the sale value of his property. The appellants enclosed an affidavit of the real estate broker with whom Wedge listed his ranch.

On March 27, 1957, Wedge also appealed to the Director from the manager's decision. In his appeal he stated that his reason for appealing was that "being a resident here the year around give [sic] me a need for more land," and that he was putting in a new diversion system and possibly a pumping unit in order to increase his irrigable acreage; that he was making these improvements to increase his hay productivity to make a year-around cow and calf operation; and that he planned to run steers on his land for two years until he could get his land back into good alfalfa production. He then asked that 40 more acres of land be awarded to him (SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 33, T. 43 N., R. 107 W.).

In an apparent answer to Wedge's contention that he planned to build a diversion system on his land and thereby increase his hay production, the appellants submitted an affidavit from a private practicing

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engineer who stated that he had examined the water sources and supply available for Wedge's property and that it appeared that the only additional water available is water from Holland Creek; that he had examined the records of the State Engineer and from those records had determined that no water right exists in behalf of Wedge in Holland Creek; that there is not sufficient water in Holland Creek to permit diversion thereof; and therefore that there is no practical means for a diversion or pumping system for lands owned by Wedge, except from his private lands.

In addition to this evidence the appellants submitted six affidavits of persons alleged to be residents of the area and familiar with the Wedge private lands and the Federal grazing lands adjacent to them. These affiants state that the Wedge lands have been incapable of producing in excess of 25 tons of hay per season in the past; that the water supply for the Wedge property dries up during the month of July; and that to the best of their knowledge the Wedge lands cannot be converted in any manner to provide sufficiently for the year-around maintenance and sustenance of cattle.

The appellants also requested a hearing for the purpose of presenting evidence.

As stated above, the Acting Director affirmed the range manager's decision. He did not expressly act upon the request for hearing but must be considered to have denied it. In a separate decision dated the same day (August 21, 1957), the Acting Director dismissed Wedge's appeal on procedural grounds.

In their present appeal the Winchesters assail the Acting Director's decision on the ground that he completely ignored the detailed facts and contentions advanced by them. They have also renewed their request for a hearing. Wedge has not answered the appeal, although served, nor has he appealed from the dismissal of his appeal.

On October 26, 1957, oral argument on the appeal was heard at Cheyenne, Wyoming.

Upon a careful consideration of the entire case, including the arguments of the appellants, I am convinced that the basic legal principles applicable to this case have not been clearly brought out or understood. These principles are basic to a proper disposition of this case.

Section 15 of the Taylor Grazing Act, as amended (*supra*), provides as follows:

The Secretary of the Interior is further authorized, in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such

terms and conditions as the Secretary may prescribe: *Provided*, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands * * *.

At the outset, it should be observed that section 15 does not say that, in order to be entitled to a preference, an applicant for a grazing lease must be engaged in the livestock business. All that section 15 requires is that the land applied for be used "for grazing purposes" and that the applicant be an owner or occupant of contiguous land within one of the classes enumerated.

The appellants have quoted a provision in section 3 of the Taylor Grazing Act which states: "Preference shall be given in the issuance of grazing *permits* to those within or near a *district* who are land-owners *engaged in the livestock business*, bona fide occupants or settlers, * * * as may be necessary to permit the proper use of lands * * * owned, occupied, or leased by them * * *" (43 U. S. C., 1952 ed., sec. 315b; italics added). But section 3 pertains only to the issuance of permits, as distinguished from leases, for lands in *grazing districts* established pursuant to section 1 of the act (43 U. S. C., 1952 ed., sec. 315). Section 15 expressly applies only to lands which are *not included* in grazing districts, *Felix Bruno*, 56 I. D. 289 (1938).

It is true that the Department has said in several decisions that in order to be a qualified applicant for a section-15 lease one must be engaged "in the livestock business" or must give reasonable assurance that he will in the reasonably near future engage in the livestock business.² It is not clear, however, what the decisions meant by "livestock business." In none of the decisions was it indicated that an applicant must be engaged exclusively in the raising of livestock or even derive his principal source of income from raising livestock. In all the decisions cited the applicant had no livestock and no immediate intent to graze livestock of his own on the public land sought to be leased. Thus the Department has not held that one is disqualified to obtain a section 15 lease where he needs Federal land to graze livestock of his own although he is not primarily engaged in the livestock business.

I do not see how the Department could so hold with respect to a preference-right applicant. Indeed, such an interpretation is negated by the fact that "homesteaders" are enumerated among the classes of persons entitled to a preference right if their lands are contiguous to the public lands sought to be leased. For all practical purposes, under section 7 of the Taylor Grazing Act, as amended

² *Orin L. Patterson et al.*, 56 I. D. 380 (1938); *Harry Gourley v. Donald M. Robson*, A-24511 (June 19, 1947); *Paul Guske*, A-24705 (March 1, 1948); *Bryant Adams*, A-24693 (January 5, 1949); *N. S. Oberan*, A-25422 (December 9, 1949).

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(43 U. S. C., 1952 ed., sec. 315f), and the homestead law (43 U. S. C., 1952 ed., sec. 164), public land can be homesteaded only if the land is classified by the Secretary as being more suitable for the production of agricultural crops than for grazing. In order to perfect his entry and receive a patent to his entry, a homesteader must cultivate a certain area of his entry. These requirements clearly suggest that homesteaders as a rule are not engaged in the livestock business but in agricultural production, yet they are specifically named as a class of persons entitled to a preference right to a section 15 lease. If a homesteader kept work animals or a few livestock for domestic uses and needed adjoining Federal land to graze his stock, I do not believe the Department could deny his preference right to a lease on the ground that he was not primarily engaged in the livestock business.³

This does not mean, of course, that in deciding between two or more preference-right applicants, the Department could not award land to one who is primarily or exclusively engaged in the livestock business over another who grazes livestock only incidentally. However, such an award could not be predicated on the legal proposition that the latter is not a qualified preference-right applicant. It could be based only on the ground that as between preference-right applicants having an equal plane of preference, the livestockman has shown that he has a greater need for the Federal range.

This leads to the second major principle which the appellants do not appear to understand and which was not clearly enunciated in the decisions below, although indicated in the range manager's decision. Section 15 grants a preference right to owners or occupants of contiguous lands *only* "to the extent necessary to permit proper use of *such contiguous land*" [italics added]. As the Department

³The proviso in section 15 granting the preference right was added by the act of June 26, 1936 (49 Stat. 1978). The same proviso had been included in an amendment of section 15 made by H. R. 3019, 74th Cong., 1st sess., which had passed the Congress but was pocket-vetted by the President on September 5, 1935, because of objectionable features of the bill. The act of June 26, 1936, eliminated these undesirable features.

Appended to the veto was a memorandum dated August 26, 1935, from the Secretary of the Interior to the President. In this memorandum reference was made in discussing section 15 to small stockmen who had taken stockraising homestead entries. This suggests that the term "homesteaders" used in the preference-right proviso was thought to relate to stockraising homesteaders who, of course, could make entry only on land designated as chiefly valuable for grazing and raising forage crops (43 U. S. C., 1952 ed., sec. 291).

However, in the Senate debate on the 1936 amendments to the Taylor Grazing Act generally, it seems to have been assumed that agricultural homesteaders were entitled to a preference (79 Cong. Rec. 12177-79). The discussion was apparently directed to section 3, but it seems clear that Congress would not have intended a more restrictive meaning to be placed on the term "homesteaders" in section 15. Section 3, it will be noted, does not give top priority to "persons engaged in the livestock business" but an equal preference to "bona fide occupants or settlers."

said in *Claude G. Burson and Ellsworth E. Brown*, 59 I. D. 539 (1947) :

* * * the degree of preference to be given to competing lawful occupants of contiguous lands must be commensurate with the degree of need *which the contiguous base lands of the respective occupants have for the lease lands* if the base lands are to be put to proper use for the grazing of livestock by such occupants. Not only must the base lands be contiguous to the lease lands, *but the lease lands must be necessary to the base lands*, complementing them and supplying their deficiencies in order to insure their proper use for the occupant's own grazing operations. [P. 542; italics added.]

In summary, therefore, it is apparent that the preference right to a grazing lease accorded by the second provision of section 15 depends upon three essential qualifications pertaining to the base lands, namely, their non-public-land status, their contiguity to the lease lands, *and their need for the lease lands*. Of these three qualifications no single one is by itself sufficient to create a preference claim. The preference right springs only from the coexistence of all three conditions, and, if one of these be lacking, there is no preference right. [P. 544; italics added.]

The significance of this principle lies in the following facts: The appellants assert that they have a year-around livestock operation, with winter pasture and hay lands available to support over twice their present herd. They lack, however, sufficient summer grazing lands to increase their operations. The 80 acres in dispute, which have been under lease to them, are summer lands. The appellants therefore claim an urgent need of the 80 acres to complement their winter base lands and to stabilize their operations. On the other hand, they say, Wedge does not have any winter land. Consequently, he buys stock in the spring, grazes them on his base lands and the Federal range in the summer, and sells them in the fall. This, they claim, is a purely speculative operation conducted at the expense of a bona fide livestock producer.

These are important facts, but while they have significance, as will be pointed out later, the significance, except in a negative sense, is not with respect to the question whether the appellants or Wedge, *as preference-right applicants*, are entitled to the 80 acres. The reason for this conclusion is this: The range manager stated in his decision that—

The contiguous base lands of both applicants is suitable only for summer grazing. Winchesters have at a lower elevation an extensive hay ranch where the cattle are wintered * * *.

In an early field report dated February 2, 1943, on an application by the Winchesters for a grazing lease on, among other lands, the 80 acres in controversy, it was stated that they owned certain lands, which include much of the contiguous lands involved in this proceeding, and also a lower ranch east of Crowheart, Wyoming, where they had a complete ranch set-up. It was stated that the public lands

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then applied for were or would be used as summer range and that the livestock were wintered at the lower ranch.

In their appeal to the Director in this proceeding the appellants quoted without dissent the passage just quoted from the range manager's decision.

So far as the record indicates, therefore, the contiguous lands upon which both the appellants and Wedge rely for their preference right are only summer lands. They are used for the same purposes as the adjoining public lands sought by them. The appellants' winter lands are at a lower elevation and do not appear to be contiguous to the public lands in dispute. It follows that the appellants cannot claim a preference right to the 80 acres on the ground that that tract is necessary to permit proper use of their winter lands. So far as their assertions of preference rights are concerned, both the appellants and Wedge can claim the 80 acres only to the extent that the 80 acres are "necessary to permit proper use of * * * [their] contiguous lands," which in the case of both are only summer lands. The appellants and Wedge therefore stand on the same plane so far as the character of their contiguous lands is concerned.

Referring back to the Department's decision in the *Burson* case, as well as to section 15, it will be noted that a relationship of need must exist between the public land sought to be leased and the contiguous non-public land before a preference right can attach. No real showing of need between the tracts of contiguous summer grazing lands and the 80 acres has been made by either party. Neither the appellants nor Wedge have demonstrated a need for the public summer land to permit proper use of their contiguous summer lands. In other words, the 80 acres have not been shown to complement the parties' adjoining lands but merely to supplement them. It has not been shown that the loss of the 80 acres to either party would have any significant effect on the use that he could make of his adjoining summer land.⁴ The situation is quite different with respect to the appellants' winter lands, but they are not contiguous.

The case then comes to this: Both the appellants and Wedge stand on an equal legal plane so far as their status as preference-right applicants is concerned. Neither has shown a preference right to lease the 80 acres so far as their contiguous lands are concerned, because neither has shown a relationship of need between the 80 acres

⁴ In their appeal to the Director, the appellants briefly claimed that if Wedge was awarded the 80 acres they would lose water sources on that tract and that their cattle would have to overcome rugged topography to go to other water sources. The range manager has commented that the appellants' cattle can still trail around the 80 acres, as they have done in the past, and that water is plentiful in both the north and south halves of the SE $\frac{1}{4}$ sec. 4. There is no showing at all that if the appellants lose the 80 acres, they would be prevented from grazing the same number of livestock on their contiguous lands as they have grazed in the past.

and the contiguous lands. In the absence of such a showing, the decision between them can be made only as though neither owned contiguous lands.

In making an award between the contending parties on that basis, the factors to be considered should include the respective needs of the parties and proper range management. *Jane M. Sandoz et al.*, 60 I. D. 63 (1947); *Roy Daly*, A-24565 (June 3, 1947). In determining need, there can be considered, indeed should be considered, the entire operations of the applicants and how the land applied for fits into those operations. In this case, it would mean that the appellants' total livestock operation, including the use of their non-contiguous winter lands could be considered. It may be argued that if such is the case it is sophistry to say, as was said earlier, that the appellants' winter ranch cannot be considered in determining whether the appellants have a preference right to the 80 acres in question because such ranch is not contiguous. But the distinction is important. As between contending applicants who are both owners of contiguous lands and who therefore stand on the same plane of equality, an award must be made to the one who has the greater need of the public land to permit proper use of his contiguous land. As between contending applicants only one of whom owns contiguous land, an award must be made to him if he needs the public land for proper use of his contiguous land, even though if all factors could be considered the non-owner of contiguous land has a far greater need of the public land for grazing purposes. The rights of the contiguous applicant are to be determined before any consideration is given to the noncontiguous applicant. See *Roscoe L. Patterson v. Craig S. Thorn*, 60 I. D. 11 (1947); *E. Ray Cowden and Violet F. Kuns*, A-24559 (November 22, 1948). If the contending applicants do not own or occupy contiguous land, then the decision to be made must be based on a consideration of all factors, including their operations on base lands which, of course, are not contiguous. See *Jane M. Sandoz et al.*, *supra*. On the basis of the present record, the appellants and Wedge, in effect, fall into the last category.

As I stated earlier, the principles which have been discussed do not appear to have been clearly understood. Such facts as there are in the record have not been related to these principles. It is therefore impossible to make a proper determination now as to how the 80 acres in controversy should be awarded. The case must be sent back for a re-examination of the facts and the ascertainment of such additional facts as may be necessary to make a proper award. The facts supporting the award should be set forth and not mere conclusions.

In making the redetermination, the allegations of the appellants should be considered. It may be observed at this time, however, that

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the mere fact that Wedge may have listed his base lands for sale is not a ground for denying him a preference right if he still retains ownership or control over the lands adjoining the N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 4 upon which he based his preference-right claim and shows the requisite need for that tract. However, if Wedge should dispose of his base lands after a lease has been issued to him on the basis of such lands, the lease would be subject to immediate cancellation by virtue of his disposal of his base lands. *The Swan Company v. Alfred and Harold Banzhaf*, 59 I. D. 262 (1947); *Carl O. Thomsen, Carl M. Ballinger*, A-27171 (November 7, 1955).

One other allegation by the appellants should be noted. On their appeal to the Secretary they have submitted an affidavit dated September 18, 1957, by Robert A. Williams, a neighboring rancher with Wedge, who states that during 1957 Wedge has stocked on all his lands, including Taylor Grazing lands, only three head of horses. The appellants urge that this demonstrates that the award of the 80 acres to Wedge was not in accordance with proper range management. This allegation should be given careful consideration.

With respect to the appellants' request for a hearing, it does not appear that the essential facts cannot be ascertained by a proper field investigation, which is the invariable procedure followed by the Department to secure additional facts in cases of this nature. Consequently, the request for a hearing is denied.

It may be observed that until final action is taken on the appellants' application to renew their lease so far as the 80 acres are concerned, they are entitled to the exclusive grazing use of that tract (43 CFR 160.16).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the case is remanded to the Bureau of Land Management for further consideration and action in accordance with this decision.

ELMER F. BENNETT,
Solicitor.

IN THE MATTER OF THE WILL OF KENNETH STRIKEAXE,
DECEASED UNALLOTTED OSAGE INDIAN

IA-248

Decided April 21, 1958

Indian Lands: Descent and Distribution: Wills

The disapproval of a will of an Osage Indian by the authorized representative of the Secretary of the Interior results in a disapproval of the entire instrument, including the revocation clause contained in the will, where the reasons for such disapproval extend to the entire instrument.

Indian Lands: Descent and Distribution: Wills

Where a testator by will revokes a prior will but had included in both instruments similar devises, and there is no reason to suppose that he would have made the change if he had been aware that the change would have been wholly futile, the doctrine of dependent relative revocation should be applied and the revocation clause in testator's later will should be held to be ineffectual to cancel the prior will or to destroy testator's intention to die testate.

Indian Lands: Descent and Distribution: Wills

Where the testamentary capacity of the testator is attacked, or undue influence is charged, and the protestants to an earlier will fail to offer evidence in support of their contentions, and where the Field Solicitor who conducted the will hearing advises that the will was prepared and executed in accordance with the laws of Oklahoma, and that its terms were not unnatural, such instrument will be approved by the Secretary of the Interior in the exercise of his administrative discretion under the applicable statutes.

APPEAL FROM THE SUPERINTENDENT OF THE OSAGE INDIAN AGENCY

Nancy Strikeaxe, Willard A. Eads and Donald George Strikeaxe, by the latter's guardian ad litem, Paul A. Comstack, have appealed to the Commissioner of Indian Affairs from a decision of the Superintendent of the Osage Indian Agency, dated February 15, 1955, disapproving the last will and testament, dated April 9, 1953, of Kenneth Strikeaxe, a deceased unallotted Osage Indian.¹ This will was approved as to form on April 10, 1953, by Hugh A. White, special attorney for the Osage Agency.

The decedent, Kenneth Strikeaxe, died on January 17, 1954, a resident of Tulsa County, Oklahoma, survived by his widow, Nancy Strikeaxe, and an adopted son, Donald George Strikeaxe. In the event of intestacy these survivors apparently would inherit the estate in equal shares, if they are qualified to inherit under the act of February 27, 1925 (43 Stat. 1008), as amended by the act of September 1, 1950 (64 Stat. 572). If they are not so qualified, then Naomi W. Myers and Virginia Rose Wolfe, unallotted half-sisters of the decedent and Olivia, Nancy, Freda and George Chester Gilliland, Jr., children of an unallotted deceased sister of decedent, would appear to inherit. The decedent left an estate consisting of one and one-third Osage headrights, \$3,172.58 surplus funds in account No. S-135 at the Osage Agency; \$2,228.33 trust funds in the Treasury of the United States, and real estate appraised at \$7,295.

¹ Under Section 8 of the act of April 18, 1912 (37 Stat. 86), adult members of the Osage Tribe of Indians not mentally incompetent may dispose of their restricted estates by will in accordance with the laws of the State of Oklahoma, and subject to the approval of the Secretary of the Interior. The function of approval or disapproval in this respect was delegated to the Superintendent of the Osage Indian Agency under the regulations of the Department (25 CFR 17.12). Although section 17.14 of those regulations provides for an appeal from the Superintendent's action to the Commissioner of Indian Affairs, and for a further appeal to the Secretary, for administrative reasons the Commissioner of Indian Affairs has referred the present appeal directly to the Secretary of the Interior for action.

April 21, 1953

Under the terms of the purported last will of Kenneth Strikeaxe, the testator devised \$10 to each of his half-sisters, Naomi Wolfe Myers and Virginia Wolfe; \$10 to each of his three nieces and one nephew; 80 acres of land appraised at \$960 to a friend, Willard A. Eads; certain real estate to his adopted son, and the remainder of his estate to his wife and adopted son in equal shares.

Naomi Wolfe Myers and Virginia Rose Wolfe, the half-sisters of decedent, and L. M. Colville, guardian ad litem for decedent's three nieces and one nephew, protested the approval of the will on the grounds that they are the natural objects of his bounty; that if the will be approved a very substantial portion of the decedent's property would pass to people in no way related to him, and the remainder would pass to persons who would not be capable of inheriting the property under the laws of Oklahoma and the acts of Congress governing the devolution of property of full-blood members of the Osage Tribe of Indians; and that considering the will as a whole, it is an unnatural instrument. Moreover, the protestants stated that the will should not be approved as such action would lend encouragement to full-blood members of the Osage Tribe to be induced to will their property to non-members of the tribe and deprive relatives, the natural objects of a testator's bounty, from receiving and retaining within the tribe the restricted property involved; that decedent used intoxicants excessively and was under the influence thereof when the will was executed, and that the use thereof and the procuring of said intoxicants influenced him in naming certain persons as beneficiaries; also that the said purported will bearing date of April 9, 1953, was specifically revoked by Kenneth Strikeaxe through a later purported will bearing date of December 14, 1953.

The hearing of proof for the approval or disapproval of the will of April 9, 1953, was held before a Field Solicitor, to whom authority was delegated to conduct such a hearing. In his recommendations to the Superintendent, the Field Solicitor found from the evidence adduced at the hearing that the will bearing date of April 9, 1953, was executed according to law, and while he found no fraud, duress or undue influence having been exercised to procure its execution, nevertheless, it was his view that such will was revoked by the later instrument of December 14, 1953. On February 15, 1955, the Acting Superintendent of the Osage Agency disapproved the purported will of April 9, 1953.

It appears that decedent had executed several wills at various dates during the last eight years of his life, including the two instruments mentioned above. The above purported will, dated December 14, 1953, was first filed with the Superintendent, with a petition for its

approval. A hearing was had before the then Area Counsel who recommended disapproval of the instrument, dated December 14, 1953, giving as his reasons for such recommendation that the will made a bequest of an Osage headright to "my son Jimmie Strikeaxe" when in fact the evidence failed to identify such person; that the will gave some land (425 acres) to individuals unrelated to the decedent, consisting of a certain person and the latter's children, which person, according to the evidence, appears to have been known in the community as a bootlegger and with whom the decedent's only relationship apparently was that of a customer. While the purported will of December 14, 1953, was properly executed in accordance with the statutes of the State of Oklahoma, nevertheless, the area counsel concluded that such purported will was an "unnatural and frivolous instrument and is not entitled to approval as the last will and testament of the decedent." Upon this recommendation, the Superintendent, on August 16, 1954, disapproved the purported will of December 14, 1953, from which decision no appeal was taken.

The objections of the protestants to the instrument bearing date of April 9, 1953, are not well founded, and cannot be given favorable consideration. The right of an Osage Indian to make a will is found in section 8 of the act of April 18, 1912 (37 Stat. 86), which reads as follows:

That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: *Provided*, That no such will shall be admitted to probate *or have any validity* unless approved before or after the death of the testator by the Secretary of the Interior. [Italics ours.]

The protestants failed to offer any evidence at the hearing which would show that the decedent was incompetent, or to support their contention that such will was the result of undue influence. Accordingly, the only question now to be resolved is whether or not the revocation clause contained in the purported will of December 14, 1953, was effective and did in fact cancel and revoke all former wills of the decedent, including the will of April 9, 1953. This revocation clause reads as follows:

I, Kenneth A. Strikeaxe, do hereby make, publish, and declare the following to be my last will and testament, hereby revoking and canceling all other former wills and codicils by me at any time made.

The laws of the State of Oklahoma provide specific requirements to revoke or alter a written will. These are contained in 84 Okla. Stats. (1951), section 101 of which reads in part as follows:

Except in the cases in this article mentioned no written will, nor any part thereof, can be revoked or altered otherwise than:

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1. By a written will or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; * * *.

There seems to be no doubt but that the instrument of December 14, 1953, was executed with the same formalities as the instrument dated April 9, 1953, and that both met all of the statutory requirements of the State of Oklahoma for the execution and publishing of a will. The question now presented is, would the disapproval of the December 14, 1953 instrument, as being "unnatural and frivolous" void such instrument in its entirety, including the revocation clause, or does the revocation clause remain operative even though the will cannot be admitted to probate.

It is contended by the protestants to the will of April 9, 1953, that the fact that the will of December 14, 1953, was not approved by the Secretary of the Interior, or his authorized representative, does not prevent the revocation of the will of April 9, 1953, by the revocation clause contained in the will of December 14, 1953. They cite in support of this contention *Chesnut v. Capey*, 45 Okla. 754, 146 Pac. 589 (1915); *Puckett v. Brittain*, 152 Okla. 184, 3 P. 2d 876 (1931); *Rice v. Rice* (Mo. App.), 197 S. W. 2d 994 (1946); *Armstrong v. Letty*, 85 Okla. 205, 209 Pac. 168 (1922); *Phillips v. Smith*, 186 Okla. 636, 100 P. 2d 249 (1939). In the *Puckett* and *Rice* cases the court held that a will containing a revocation clause and not admitted to probate may nevertheless revoke previous wills. The case of *Chesnut v. Capey*, *supra*, involves the will of a full-blood member of the Choctaw Tribe of Indians, which was executed in accordance with the Oklahoma statutes, and was also acknowledged and approved by a judge of a United States court as provided by section 23 of the act of April 26, 1906 (34 Stat. 137), requiring such acknowledgment and approval when a wife or other stated relatives were disinherited.² In the *Chesnut* case a later instrument revoking all wills, but making no devise, was executed in compliance with the Oklahoma statute, but was not acknowledged and approved as required by the 1906 act. The court held that the revocatory instrument had the force and effect to revoke all prior wills. The case of *Phillips v. Smith*, *supra*, also involves the will of a full-blood Choctaw Indian, which will was executed in full compliance with the Oklahoma statute and was acknowledged and approved in accordance with the act of April 26, 1906, *supra*, giving \$5 to a son and \$5 to the

² "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner."

wife of the testator. A later will, devising 80 acres of land to testator's son, provided that the rest, residue and remainder of his property was to be divided share and share alike among a niece, a nephew and a friend. The later will was acknowledged in accordance with Oklahoma law, but was not acknowledged and approved in conformity with the 1906 act. The court held that the later will revoked the former will, although it may fail as a devising instrument because of circumstances dehors the instrument. The decision in the case of *Armstrong v. Letty, supra*, found that the approval and acknowledgment of the will of a full-blood Indian, required by the act of Congress, is a requisite to the validity of the devise of restricted lands and is not an element of due execution and attestation of the will of such Indian.

On the other hand it is contended by the proponents of the will, dated April 9, 1953, that if a will is found to be invalid because of the exercise of undue influence, the revocation clause will also fail. In support of this contention they cite *Yahn v. Barant*, 258 Wis. 280, 45 N. W. 2d 702 (1951). It is a general rule of law, including statutory law, that a revocation clause made under undue influence will fail. Title 84, Okla. Stats., section 43, states:

A will or part of a will procured to be made by duress, menace, fraud or undue influence, may be denied probate; and a revocation procured by the same means, may be declared void.

The record of the testimony adduced at the hearing on the will, dated December 14, 1953, does not reveal any evidence of direct undue influence upon the testator at the time of the execution of the will, or otherwise, except that he was addicted to the use of strong drink and was a customer of a beneficiary named in the will, who was reputed to be a bootlegger. It would seem, however, that the same impelling force, whatever it may have been, which induced Kenneth Strikeaxe to execute an unnatural and frivolous will, also induced him to include therein a revocation of former wills. Moreover, it is noted that William S. Hamilton, who appeared as counsel in behalf of certain contestants to the purported will, dated December 14, 1953, is now appearing for the protestants of the will dated April 9, 1953. At the hearing before the area counsel on the purported will dated December 14, 1953, he stated:

Our contest of this will is that it is absolutely unnatural on the face of it on the facts developed here and it is not worthy of approval or being probated or offered for probate in the county court in the county of the residence of decedent at the time of his death, for two reasons, that the evidence with reference to Flo McKee shows it is absolutely unnatural, couldn't possibly have been any devise to him and the members of his family except under improper influence growing out of intoxicants, and the provision for Jimmie Strikeaxe, a person not in existence, makes it entirely an unnatural will. Therefore the will should be disapproved.

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It would appear by the contentions which the protestants had made to the purported will, dated December 14, 1953, that the unnatural aspect of that will resulted from undue influence upon Kenneth Strikeaxe by his reputed bootlegger, a chief beneficiary, with whom he had a confidential relation. This relation, we believe, was sufficient to raise the presumption of undue influence. The rule of law in such circumstances is stated in 57 Am. Jur., Wills, sec. 398, as follows:

* * * the circumstance of inequality or unfairness in the will, coupled with a confidential relation between the testator and a favored beneficiary, as a result of which the beneficiary had dominated and controlled the testator for some time, has been held sufficient to raise the presumption of undue influence and cast upon the proponent the burden of producing evidence to show that the will represented the uncontrolled act of the testator. * * *

The present protestants to the will of April 9, 1953, further contend that the instrument of December 14, 1953, could be valid in part and invalid in part even though the denial of a part was found to have resulted from undue influence, citing, *Zeigler v. Coffin*, 219 Ala. 586, 123 So. 2d (1929); *In the Matter of the Estate of Herrley*, *Pendley v. Schroeder*, 276 P. 2d 247 (Okla., 1954); *In re Webster's Estate*, 43 Calif. App. 2d 6, 110 P. 2d 81 (1941). This may be true under general probate law when the parts affected by undue influence are separable, so that the will remains complete and intelligible in itself. However, there was no contention made at the hearing before the area counsel that any part of the purported will, dated December 14, 1953, was free from the influence or impelling force that prompted the area counsel to recommend disapproval of the will, and there is no indication from his findings that any part of the document was regarded as valid.

We must assume that Kenneth Strikeaxe had knowledge of the probable incapability of his wife and adopted son to inherit his property under the laws of Oklahoma and the acts of Congress governing the devolution of property of full-blood members of the Osage Tribe of Indians. He acted consistently as a testator in both wills to make substantial devises to his wife and adopted son, of which they may be deprived should he be held to have died intestate. It was clearly not his intention to deprive his wife and child of the property should the will of December 14, 1953 fail. Therefore, the doctrine of dependent relative revocation should apply. As stated in 57 Am. Jur., Wills, sec. 514:

* * * The doctrine is based upon the presumption that the testator acted with the view and for the purpose of substituting some other disposition of his property for that which he canceled, and that there is therefore no reason to suppose that he would have made this change if he had been aware that it would have been wholly futile. The desire to prevent intestacy is often asserted in support of the application of the doctrine of dependent relative revocation. * * *

³ See also *Blackford v. Anderson*, 226 Iowa 1138, 286 N. W. 735 (1939).

Again, in 57 Am. Jur., Wills, sec. 515, it is stated that:

The vital question in any case in which it is sought to apply the doctrine is whether the testator intended the revocation to be absolute or conditional upon the execution of a new and valid will. * * *

The doctrine is further defined by the courts in the cases which follow. *In Re Roeder's Estate*, 44 N. M. 578, 106 P. 2d 847 (1940), the court said:

Just what, then, is the doctrine of dependent relative revocation? It is well stated in 1 Jarman on Wills (5th Ed., Bigelow) 166, as follows: "And here it may be observed, that, where the act of cancellation or destruction is connected with the making of another will, so as fairly to raise the inference, that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force."

In the same case the court stated:

* * * This rule is styled the doctrine of dependent relative revocation. It is based upon the presumption that the testator performed the act of revocation with a view and for the purpose of making some other disposition of his property in place of that which was canceled, and that there is, therefore, no reason to suppose that he would have made the change if he had been aware that it would have been wholly futile, but that his wishes with regard to his property, as expressed in his original will, would have remained unchanged, in the absence of any known and sufficient reason for changing them.

In Re Heazle's Estate, 72 Idaho 307, 240 P. 2d 821 (1952), we find the following language:

* * * This doctrine assumes that had the testator known that the instrument containing the revocation was not effective as a will, he would not have declared the revocation, but would prefer his previous will to intestacy. * * * As stated, the doctrine is subordinate to the rule which makes the intention of the testator paramount. Its application is, therefore, limited to cases in which it can operate in furtherance of the intention of the testator. And it is not to be applied in cases where it would defeat such intention. Accordingly, it has been applied in cases where the subsequent will made the same or similar disposition of property as that made by the former, both of which would be defeated or modified by intestacy. From such facts it is presumed that the testator would prefer the probate of the first will than to have his estate descend according to law.

In the recent case of *Linkins v. Protestant Episcopal Cathedral Found.*, 87 C. A. D. 351, 187 F. 2d 357 (1950), the court said:

The doctrine of dependent relative revocation is basically an application of the rule that a testator's intention governs; it is not a doctrine defeating that intent. * * *

Since the protestants of the will, dated April 9, 1953, rely strongly on cases in which wills made under Section 23 of the act of April 26, 1906, *supra*, were revoked by subsequent instruments, it may be well to define the difference between the act of 1906 and the Osage will act of 1912. There appears to be no question but that the above provision

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of the 1906 act is not an element of the execution or attestation of a will.⁴ The provision is, however, a requisite to the validity of any devise disinheriting the parent, wife, spouse, or children of such full-blood, but is limited to devises of real estate. This is a limitation imposed upon members of the Five Civilized Tribes under their authority to dispose of their property by will, and is clearly not applicable to the will of an Osage Indian. In fact, the provisions of the 1906 act granted to members of the Five Civilized Tribes the right to dispose of their property in the same manner as a non-Indian, under the laws of the State, except a devise of land which disinherited the parent, wife, spouse, or children, in which event a special execution and approval is required.⁵ As stated above, section 23 of the 1906 act is of limited applicability, and merely states that no will devising real estate shall be valid where certain requirements as to such a devise are not met. On the other hand, the Osage act of 1912 is applicable to all restricted property of an adult member of the Osage Tribe of Indians, and states that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior. As distinguished from the Five Tribes' wills provision, the approval or disapproval of an Osage Indian's will, as in the present case, affected the entire instrument, including the revocation clause contained in the will as a part thereof. The will of December 14, 1953, was not approved, as required. Therefore, in the light of the statutory provision that such a will, lacking approval, cannot be admitted to probate or have any validity, it follows that when the Superintendent disapproved the will, the entire instrument, including the revocation clause, was invalid for all purposes. This is the only reasonable conclusion which can be derived from the circumstances in the present case where it has been determined that the reasons for the disapproval of the December 14, 1953 will extended to the whole instrument, including the revocation clause.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509, as revised; 17 F. R. 6793), the action of the Superintendent of the Osage Indian Agency, disapproving the last will and testament of Kenneth Strikeaxe, bearing date of April 9, 1953, is reversed, and the said will is hereby approved, with the direction that it be delivered to the appropriate county court in Oklahoma for probate.

EDMUND T. FRITZ,
Deputy Solicitor.

⁴ *Armstrong v. Letty*, *supra*.

⁵ *Blundell, Executor, et al. v. Wallace*, 267 U. S. 373 (1925).

A. W. KIMBALL ET AL.

A-27526

*Decided April 21, 1958***Mining Claims: Lands Subject to—Mining Claims: Special Acts— Mining Claims: Withdrawn Land—Withdrawals and Reservations: Revocation and Restoration**

Neither the Atomic Energy Act of 1946 nor the Atomic Energy Act of 1954 restored to the operation of the mining laws lands previously reserved or withdrawn from the operation of those laws.

Mining Claims: Lands Subject to—Mining Claims: Special Acts— Mining Claims: Withdrawn Land—Withdrawals and Reservations: Power Sites—Withdrawals and Reservations: Reclamation Withdrawals

The act of August 11, 1955, the Mining Claims Rights Restoration Act of 1955, did not open to mining location land which was previously withdrawn or reserved for power development or power sites and which, in addition, was withdrawn for reclamation purposes.

Mining Claims: Lands Subject to—Mining Claims: Special Acts—Mining Claims: Withdrawn Land—Withdrawals and Reservations: Power Sites

Mining claims located on land withdrawn for power site purposes are null and void where such locations were made prior to the act of August 11, 1955.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

In 1950 and 1951, A. W. Kimball and others¹ located 24 placer mining claims on public lands in Ts. 12 and 13 N., R. 9 E., B. M., Idaho. Thereafter, on August 7, 1956, copies of the notices of location, reciting that the claims were located under the mining laws of the United States (30 U. S. C., 1952 ed., sec. 21 *et seq.*), were filed for record in the Idaho land office. The manager of the land office declared the claims to be null and void because the lands were reserved for power development and withdrawn for reclamation purposes at the time the claims were located. The locators appealed to the Director of the Bureau of Land Management who, in a decision dated May 20, 1957, sustained the manager. The Director held that the act of August 11, 1955 (30 U. S. C., 1952 ed., Supp. IV, secs. 621-625), pursuant to which the notices of location were filed for record in the land office, did not validate these claims, which, he held, were invalid when located because of the prior reservation and withdrawal of the lands from the operation of the mining laws.

The locators have appealed to the Secretary of the Interior. They contend that the claims contain source material as defined in paragraph (1) of subsection (b) of section 5 of the Atomic Energy Act

¹ Minda Kimball, Earl Kimball, Bob Johnson, Robert L. Wilson, Ellen M. Wilson, Roberta Wilson, Grace Cantrall, Harmon Kimball.

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of 1946 (42 U. S. C., 1952 ed., sec. 1805 (b) (1)) and in paragraph (s) of section 11 of the Atomic Energy Act of 1954 (42 U. S. C., 1952 ed., Supp. IV, sec. 2014 (s)) and that the control of source material and the public land in which it is found is in the Atomic Energy Commission, under the provisions of subsection (b) of section 5 of the 1946 act and under section 67 of the Atomic Energy Act of 1954 (42 U. S. C., 1952 ed., Supp. IV, sec. 2097). They contend that the Commission's jurisdiction over the land supersedes that of any other governmental agency, regardless of any prior reservation or withdrawal of the land for any purpose. They state that the Atomic Energy Commission has explored, drilled, and tested the claims and that on May 15, 1951, the Commission entered into an agreement with the claimants, pursuant to paragraph (6), subsection (b) of section 5 of the 1946 act, under which the Commission could conduct exploratory operations on the claims, thereby, they state, recognizing their interest in the mining claims and their rights thereto. They contend, further, that section 4 of the act of August 11, 1955 (30 U. S. C., 1952 ed., Supp. IV, sec. 623), specifically recognizes the validity of prior locations of unpatented mining claims in that it provides for the filing of copies of the notices of location of such claims in the local land office within one year after August 11, 1955 "as to any or all locations heretofore made."

The records of the Department show that long prior to the enactment of the Atomic Energy Act of 1946 (42 U. S. C., 1952 ed., sec. 1801 *et seq.*), the lands involved in these claims² were, with other lands, on December 9, 1926, classified as a power site (Power Site Classification No. 155, Idaho No. 8, Bear Valley and Stanley Basin)³ and thus affected by section 24 of the Federal Power Act, as amended (16 U. S. C., 1952 ed., sec. 818).⁴ The records show that thereafter,

² The Director's decision states that land in sec. 34, T. 12 N., R. 9 E., is included in the claims. However, an examination of the location notices fails to reveal that land in that section is covered by any of the 24 claims.

³ In 1926, when the power site classification was made, the lands were unsurveyed. Thereafter by Interpretation No. 214, dated November 18, 1933, and Interpretation No. 224, dated August 2, 1934, the lands involved in these claims were described, according to recently accepted plats of survey, as being within the power site.

⁴ The section provides that:

"Any lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the [Federal Power] Commission or by Congress. * * * Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part * * *."

on December 29, 1938, the lands were withdrawn from public entry by the Secretary of the Interior under the authority conferred on him by section 3 of the Reclamation Act of June 17, 1902 (43 U. S. C., 1952 ed., sec. 416), for use in connection with the Boise Reclamation Project (4 F. R. 110). These lands have not been restored to location under the mining laws by the Secretary of the Interior.⁵

The first question for consideration is whether the Atomic Energy Act of 1946 opened reserved or withdrawn public lands of the United States to the operation of the mining laws.

Subsection (b) of section 5 of the act is the only part thereof which dealt in any manner with the public lands of the United States. Paragraph (1) of the subsection defined "source material." Paragraph (2) provided that, unless authorized by a license issued by the Atomic Energy Commission, no person might transfer or deliver, receive possession of or title to, or export from the United States any source material "after removal from its place of deposit in nature, except that licenses shall not be required for quantities of source materials which, in the opinion of the Commission, are unimportant." Paragraph (3) dealt with the standards to be established for the issuance, refusal, or revocation of licenses. Paragraph (4) authorized the Commission to issue regulations or orders requiring reports of ownership, possession, extraction, etc., of source materials "except that such reports shall not be required with respect to (A) any source material prior to removal from its place of deposit in nature, or (B) quantities of source materials which in the opinion of the Commission are unimportant or the reporting of which will discourage independent prospecting for new deposits." Paragraph (5) authorized the Commission to purchase, take, requisition, condemn or otherwise acquire supplies of source materials or any interest in real property containing deposits of source materials to the extent it deemed neces-

⁵ The act of April 23, 1932 (43 U. S. C., 1952 ed., sec. 154), provides that:

"Where public lands of the United States have been withdrawn for possible use for construction purposes under the Federal reclamation laws, and are known or believed to be valuable for minerals and would, if not so withdrawn, be subject to location and patent under the general mining laws, the Secretary of the Interior, when in his opinion the rights of the United States will not be prejudiced thereby, may, in his discretion, open the land to location, entry, and patent under the general mining laws, * * *"

So far as the records of this Department show, the Federal Power Commission had not, prior to August 11, 1955, made the determination referred to in section 24 of the Federal Power Act with respect to the lands involved in these claims, and the Secretary of the Interior had not declared the lands to be open to location, entry, or selection, subject to the limitations imposed by section 24 of that act. Nor has the Secretary opened these lands to mining location under the act of April 23, 1932. The Federal Power Commission did determine on August 30, 1956, that none of these claims embrace lands included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other act of Congress and that these lands are not under examination by a prospective licensee of the Federal Power Commission.

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sary to effectuate the provisions of the act. Paragraph (6) authorized the Commission to conduct and enter into contracts for the conduct of exploratory operations, investigations, and inspections to determine the location, extent, mode of occurrence, use, or conditions of deposits or supplies of source materials. It provided that such exploratory operations might be conducted only with the consent of the owner but that investigations and inspections might be conducted without such consent.

Paragraph (7), the provision relating to deposits of source materials in the public lands, provided that:

All uranium, thorium, and all other materials determined pursuant to paragraph (1) of this subsection to be peculiarly essential to the production of fissionable material, contained, in whatever concentration, in deposits in the public lands are reserved for the use of the United States subject to valid claims, rights, or privileges existing on August 1, 1946 * * *. The Secretary of the Interior shall cause to be inserted in every patent, conveyance, lease, permit, or other authorization granted after August 1, 1946, to use the public lands or their mineral resources under any of which there might result the extraction of any materials so reserved, a reservation to the United States of all such materials, whether or not of commercial value, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same * * *. Any lands so patented, conveyed, leased, or otherwise disposed of may be used, and any rights under any such permit or authorization may be exercised, as if no reservation of such materials had been made under this subsection; except that, when such use results in the extraction of any such material from the land in quantities which may not be transferred or delivered without a license under this subsection, such material shall be the property of the Commission and the Commission may require delivery of such material to it by any possessor thereof after such material has been separated as such from the ores in which it was contained. If the Commission requires the delivery of such material to it, it shall pay to the person mining or extracting the same, or to such other person as the Commission determines to be entitled thereto, such sums, including profits, as the Commission deems fair and reasonable for the discovery, mining, development, production, extraction, and other services performed with respect to such material prior to such delivery, but such payment shall not include any amount on account of the value of such material before removal from its place of deposit in nature. If the Commission does not require delivery of such material to it, the reservation made pursuant to this paragraph shall be of no further force or effect.

Nothing in paragraph (7) or in any other paragraph of subsection (b) of section 5 restored to the operation of the mining laws lands which had theretofore been reserved and withdrawn from the operation of those laws.⁶ While the control of all source material "after removal from its place of deposit in nature" was placed in the

⁶ Cf. *Jesse C. Clark*, A-24521 (January 14, 1947; motion for rehearing denied February 19, 1947).

Atomic Energy Commission and while those deposits of source material contained in the public lands of the United States were specifically reserved to the United States, nothing in the act changed the existing mining laws with respect to the lands subject to those laws.⁷ Although a certain amount of confusion existed following the enactment of the legislation on August 1, 1946, as to whether land otherwise subject to the mining laws could, after that date, be located for source material minerals, that act has never been construed, nor is it susceptible of construction, to open reserved and withdrawn land to the operation of the mining laws. By the end of 1948 it had been determined by the Atomic Energy Commission and concurred in by this Department that subsection (b) of section 5, and particularly paragraph (7) thereof, must be read in context with the mining laws of the United States, which, since 1872, have set the pattern for the disposal of the mineral lands of the United States. It was concluded from the legislative history of the act that Congress intended that private industry should be responsible to a large extent for the discovery and development of new deposits of source material and that despite having preserved to the Government broad powers over the reserved uranium and thorium in the public lands, the Congress had, in paragraph (7), expressed its intention of encouraging independent prospecting on those lands. It was concluded therefore that the provisions of paragraph (7) need not prevent the filing of locations on the public lands subject to location, based on the discovery of valuable deposits of uranium or thorium-bearing ores without regard to the value of any other mineral which might be contained in the ores. Briefly, the position taken by the Atomic Energy Commission and this Department was that when valuable deposits of source materials were discovered on public lands subject to location, after August 1, 1946, mining locations might be made on those lands in the same manner as in the case of any other minerals subject to the United States mining laws. Locations made on vacant, unreserved and unappropriated public lands after August 1, 1946, which were based on or which contained reserved uranium or thorium were subject to the right of the United States, through its authorized agents, to enter upon the land subject to the location and prospect for, mine, and remove the ore containing the reserved mineral.⁸

⁷ Under the mining laws all valuable mineral deposits in the public lands of the United States are open to exploration and purchase and the lands in which they are found are open to occupation and purchase except as they may have been withdrawn or reserved for other purposes and except as other provision may have been made for their disposition (30 U. S. C., 1952 ed., sec. 22).

⁸ Letter dated September 23, 1948, from the Chairman, Atomic Energy Commission, to the Secretary of the Interior and reply thereto dated November 12, 1948, from Assistant Secretary Davidson (File 1-321, General, Part 2).

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Thus it is apparent that the lands involved in these mining claims, having previously been withdrawn from the operation of the mining laws, were not made subject to those laws by any provision of the Atomic Energy Act of 1946. That the Atomic Energy Commission may have entered into an agreement with the locators authorizing the Commission to conduct exploratory operations on the lands does not establish the validity of the claims. It being apparent that the Congress did not intend by the Atomic Energy Act of 1946 to subject to the operation of the mining laws public lands previously withdrawn or reserved from the operation of such laws, any agreement which the Commission may have made with the locators, as the purported owners of the claims, is of no effect insofar as establishing the validity of the claims under the mining laws is concerned.

Nor does section 67 of the Atomic Energy Act of 1954, upon which the appellants rely, serve to validate the claims of the appellants. That section authorizes the Atomic Energy Commission to issue leases or permits for prospecting, exploring, mining and removing deposits of source material in lands belonging to the United States. The appellants do not claim to hold any lease or permit from the Commission and, if they held such a lease or permit, that lease or permit would be inconsistent with a claim to a valid location on public lands under the mining laws.

In amending the Atomic Energy Act in 1954, the Congress eliminated the reservation to the United States of deposits of source materials contained in the public lands. It provided, in paragraph (b) of section 68 (42 U. S. C., 1952 ed., Supp. IV, sec. 2098), that where patents, conveyances, leases, permits, or other authorizations had been issued which reserved to the United States such source materials and the right to enter upon the land to prospect for, mine, and remove the same, the head of the Government agency which issued the patents or other authorizations should, upon application of the holders thereof, issue new or supplemental patents or other authorizations without such reservation.

Paragraph (c) of section 68 provided:

Notwithstanding the provisions of the Atomic Energy Act of 1946, as amended, and particularly section 5 (b) (7) thereof, or the provisions of the Act of August 12, 1953 (67 Stat. 539), and particularly section 3 thereof, any mining claim, heretofore located under the mining laws of the United States, for or based upon a discovery of a mineral deposit which is a source material and which, except for the possible contrary construction of said Atomic Energy Act, would have been locatable under such mining laws, shall, insofar as adversely affected by such possible contrary construction, be valid and

effective, in all respects to the same extent as if said mineral deposit were a locatable mineral deposit other than a source material.⁹

That provision does not affect in any way the claims here under consideration. But it removes any doubts which may have remained that public lands subject to location under the mining laws could, notwithstanding the Atomic Energy Act of 1946, be located for mineral deposits which are source materials.¹⁰ At the same time, it recognized that the validity of mining claims located on the public lands for source materials is to be tested by the mining laws and not by the Atomic Energy Acts.

Nothing in the Atomic Energy Act of 1954 subjected to the operation of the mining laws lands theretofore reserved or withdrawn from the operation of those laws.

There remains for consideration the question whether the act of August 11, 1955, the Mining Claims Rights Restoration Act of 1955, and particularly section 4 thereof, recognizes the validity of these claims, as the appellants contend.

Section 2 thereof (30 U. S. C., 1952 ed., Supp. IV, sec. 621) provides that:

All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes: *Provided*, That all power rights to such lands shall be retained by the United States: * * * *And provided further*, That nothing contained herein shall be construed to open for the purposes described in this section any lands (1) which are included in any project operating or being con-

⁹ Section 10 of the act of August 13, 1954 (68 Stat. 708, 715, 716), revised section 5 (b) (7) of the Atomic Energy Act of 1946 by eliminating therefrom the reservation of source materials and by providing for the issuance of supplemental authorizations without such a reservation. It also added to the Atomic Energy Act of 1946 the substance of what in the Atomic Energy Act of 1954 became paragraph (c) of section 68.

¹⁰ The act of August 12, 1953 (30 U. S. C., 1952 ed., Supp. IV, secs. 501-505), referred to in paragraph (c) is an act which provided that any mining claim located under the mining laws of the United States subsequent to July 31, 1939, and prior to January 1, 1953, on lands of the United States which were at the time of such location included in a lease or permit issued under the mineral leasing laws (30 U. S. C., 1952 ed., sec. 181 *et seq.*) or covered by an application for such a lease or permit or known to be valuable for minerals subject to disposition under those laws should be effective to the same extent as if such mining claim had been located on lands which were at the time of such location subject to location under the mining laws. The act provided that in order to obtain the benefits thereof the owner of such a mining claim must meet the requirements set forth therein. Section 3 thereof (30 U. S. C., 1952 ed., Supp. IV, sec. 503) provided that any mining claim given force and effect by that act should be subject to the reservation to the United States specified in paragraph (7) of subsection (b) of section 5 of the Atomic Energy Act of 1946.

The act of August 12, 1953, was a tacit recognition by the Congress of the correctness of the position taken by the Department since the passage of the Mineral Leasing Act of February 25, 1920, that, unless so provided by the Congress, there could be no contemporaneous operation of the mining laws and the mineral leasing laws with respect to the same lands.

The act of August 13, 1954 (30 U. S. C., 1952 ed., Supp. IV, secs. 521-531), mentioned in fn. 9, amended both the mineral leasing laws and the mining laws to provide for multiple mineral development of the same tracts of public lands.

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structed under a license or permit issued under the Federal Power Act or other Act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, * * *.

* * * * *

(c) Nothing in this Act shall affect the validity of withdrawals or reservations for purposes other than power development.

Section 4 provides:

The owner of any unpatented mining claim located on land described in section 2 of this Act shall file for record in the United States district land office of the land district in which the claim is situated (1) within one year after the effective date of this Act, as to any or all locations heretofore made, or within sixty days of location as to locations hereafter made, a copy of the notice of location of the claim; (2) within sixty days after the expiration of any annual assessment year, a statement as to the assessment work done or improvements made during the previous assessment year.

Section 2 clearly shows that the Congress did not open to mining location all lands withdrawn or reserved for power development or power sites but only so much of those lands as come within the scope of the act. The lands involved in these claims are withdrawn for reclamation purposes and it is obvious that the act does not either open those lands to the operation of the mining laws or validate locations previously made thereon while the lands were so withdrawn.

The language "as to any or all locations heretofore made" contained in section 4 and relied on by the appellants does not apply to locations made prior to August 11, 1955, on land withdrawn or classified for power site purposes at the time when the locations were made. *Day Mines, Inc.*, 65 I. D. 145 (1958).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management, declaring the 24 mining claims to be null and void, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF ATLANTIC ALUMINUM & METAL DISTRIBUTORS, INC.

IBCA-129

Decided April 22, 1958

Contracts: Additional Compensation—Contracts: Specifications—Contracts: Interpretation

When the Government ordered a supply of copper tubing which was to be used in the fabrication of heat exchangers, and the straightness of the tubes was of "paramount" importance but the specifications, although they included straightness among the characteristics of workmanship, failed to specify a

tolerance for straightness, the supplier was entitled to additional compensation for straightening the tubing after delivery in order to meet the Government's requirement for straightness, which allowed a tolerance of only one hundredth of an inch per foot.

BOARD OF CONTRACT APPEALS

Atlantic Aluminum & Metal Distributors, Inc. (formerly known as Atlantic Steel & Iron Company), of Springfield, Massachusetts, has appealed from the findings of fact and decision of the contracting officer dated July 22, 1957, denying its claim for additional compensation in the amount of \$7,076.25 for the performance of Contract No. 14-09-060-1058, dated December 23, 1955, with the Bureau of Mines, hereinafter denominated the Bureau.

The contract, which was on U. S. Standard Form 33 (November 1949 edition) and incorporated the general provisions of U. S. Standard Form 32 (November 1949 edition), provided for the delivery of seamless copper tubes to be used by the Bureau of Mines in the construction of heat exchangers for its helium plant at Amarillo, Texas, in accordance with the terms of the invitation to bid and the specifications attached thereto.

A hearing for the purpose of taking testimony and oral argument was held before all three members of the Board at Washington, D. C., on February 10 and 11, 1958.

Part of the claim of the appellant in the amount of \$2,028.82, which represented interest charges on money withheld by the Bureau, was withdrawn at the hearing by counsel for the appellant who conceded that interest was not allowable on a claim against the United States. The Board will, therefore, consider that the appellant's claim is in the amount of \$5,047.43.

Under the terms of the contract the appellant was to deliver to the Bureau within 150 days of notice of award of the contract 35,500 seamless copper tubes in 20-foot lengths, and 22,150 seamless copper tubes in 12-foot lengths, both of an outside diameter of $\frac{1}{4}$ of an inch. The specifications provided:

Seamless copper tubes to be purchased under this invitation will be used by the Bureau of Mines in fabricating heat exchangers for refrigeration service. The tubes shall be manufactured in accordance with ASTM Specifications B 111-52.¹

This specification was entitled "Standard Specification for Copper and Copper-Alloy Seamless Condenser Tubes and Ferrule-Stock."

ASTM Specifications B 111-52 prescribed the temper and chemical composition of the tubes, as well as other characteristics. Paragraph

¹ This refers to the American Society for Testing Materials whose home office is at Philadelphia, Pa. The society issues specifications for all types of nonferrous materials.

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16 of the specifications allowed certain tolerances for the diameter, thickness, length, and weight of the tubes.² No tolerance for straightness was mentioned, however. Paragraph 17 of the specifications, headed "Workmanship," simply provided:

The tubes shall be round, *straight*, and uniform in thickness throughout. They shall be free from cracks, seams, slivers, scale, and other surface defects, both inside and outside [*italics supplied*].

As the appellant was a dealer rather than a manufacturer, the parties contemplated that the tubes would be manufactured by the firm of Heinrich Diehl & Co., of Nurnberg, West Germany,³ and shipped c. i. f., any Texas Gulf Coast port before the close of the 150 days specified in the invitation.

The contract contained two provisions on inspection of the tubes. Paragraph 5 of the general provisions of the contract provided insofar as pertinent:

(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to final acceptance.

(c) * * * Final acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, *except as otherwise provided in this contract*, but failure to inspect and accept or reject supplies shall neither relieve the contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the Government therefor [*italics supplied*].

Paragraph 19 of ASTM Specification B 111-52, headed "Inspection" provided:

The manufacturer shall afford the inspector, without charge, all reasonable facilities to satisfy him that the tubes are being furnished in accordance with this specification. All tests (except check analysis) and inspection *shall be made at the place of manufacture, prior to shipment, unless otherwise specified*, and shall be so conducted as not to interfere unnecessarily with the operation of the works. [*Italics supplied.*]

In May 1956, Mr. Maurice N. Katz, Vice President of the appellant, who was its only witness at the hearing, made a trip to Europe in the course of which he visited the Diehl firm that was manufacturing the tubes and discussed with the firm the execution and completion of the contract. After returning from abroad, he wrote a letter under date of

² By Change Order No. 1, dated June 6, 1956, and accepted by the contractor on June 11, 1956, the wall thickness tolerance of the tubes was changed to plus or minus 0.0025 inches, and the maximum phosphorus content limit to 0.025%. In bidding on the invitation, the contractor had specified the tensile strength, yield strength, and phosphorus content of the tubes.

³ The appellant's bid so stated.

May 25, 1956, to the contracting officer, in which he stressed the importance of expediting the inspection of the tubes in order to permit their shipment in time for delivery pursuant to the contract.

The Bureau had already taken steps to have the tubes inspected at the plant of the manufacturer. It had arranged to have the Engineering Procurement Center of the Army at Frankfurt, West Germany, make the inspection. Under date of May 4, 1956, the Bureau wrote to the Army a letter on this subject with which it enclosed an Army inspection requisition and a copy of ASTM Specification B 111-52. The last three paragraphs of the letter were as follows:

The Department of the Army is requested to arrange for a preinspection to assure complete understanding of the specifications. It is important to avoid delays because the copper tubing is to be incorporated in heat exchangers which will be used to produce additional quantities of urgently needed helium. Please advise us what organizational unit will actually carry out the inspection so that we may forward the information to our supplier.

If the material meets specifications without question, we will not require review of inspection reports prior to shipment.

Straightness, as required by ASTM specifications, is of paramount importance [italics supplied].

The Bureau also informed the Engineering Procurement Center in a message received by it on June 28, 1956, that curvature of the tubes to be inspected should not exceed one hundredth of an inch per foot, and this message was passed on by it to the manufacturer on the same date.⁴ Katz himself testified that the problem of straightness was first brought to his attention about June 28, 1956, and that he had many conversations thereafter with the contracting officer concerning the problem. Under date of July 2, 1956, the Bureau sent a telegram to the Engineering Procurement Center which read: "Atlantic Steel and Iron instructed mill to straighten tubing to one hundredth inch per foot. Check for compliance." Under date of July 5, 1956, the Bureau also sent a telegram to the same effect to the appellant. The telegram read: "Specifications require straight tubes. We will accept curvature one-hundredth inch per foot. Advise mill to straighten tubes."

The tubes were ready for inspection on June 27, 1956, and were inspected by a Mr. Paul Mueller on behalf of the Engineering Procurement Center on July 6, 1956.⁵ The result of the inspection was

⁴ This appears from a report dated July 16, 1956, made by the officer commanding the Engineering Procurement Center to the Chief of the Helium Operations of the Bureau (Exhibit 35 attached to the contracting officer's findings of fact). However, the message itself, which presumably was in the form of a cable, is not included in the appeal file.

⁵ A preliminary inspection of a small batch of the tubes was apparently made by a Mr. Arold of the Engineering Procurement Center as early as June 15, 1956, but Arold was superseded by Mueller who made the final inspection at the point of manufacture.

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recorded on a Form DD-250 entitled "Material Inspection and Receiving Report." The certification which was provided on this form above the signature of the inspector was as follows:

I certify that the items listed herein have been inspected by me or under my supervision. They conform to contract and have been accepted, except as noted.

However, Mueller in signing the DD-250 covering the inspection of the tubes blocked out the words "and have been accepted." There were no specific exceptions indicated by Mueller on the copy of the form which was given to the German manufacturer, and which had stamped on it in red ink the words "INFORMATION ONLY". However, the reverse side of the copy of the form transmitted to the Bureau bore the following "Note":

The items listed herein conform with requirements of specifications with the exception to the tolerance for straightness. It was found that the average sample which was checked for straightness had a uniform curvature of approx. 1 foot per total length of 20 ft.⁶

In this copy of the form the words "except as noted" in the certification were underlined.

The record clearly indicates the motive for the adoption of the rather anomalous procedure in the inspection, and explains the discrepancies between the copies of the DD-250 given to the manufacturer and the copy transmitted to the Bureau. By the time the inspection was made both Diehl and the appellant had been made aware of the "paramount importance" of straightness in the manufacture of the tubes. Indeed, the precise tolerance for straightness desired by the Bureau had already been communicated to both of them. However, it seems that Diehl had no machinery for correcting the tubes to the required straightness, and, were they to have been sent for straightening to one of the German metal-working plants which had such machinery, it would not have been possible to ship the tubes in time for them to arrive at a Texas Gulf port before the expiration of the time allowed in the contract. The expedient was, therefore, adopted of signing "information" copies of Form DD-250 in order "to avoid any further delay in shipment."⁷ Under the ap-

⁶Until they were notified that a straightness tolerance of one hundredth of an inch per foot was applicable, the inspectors of the Engineering Procurement Center considered that the tubes had to meet the straightness tolerance of ASTM Designation B 251-54, which allowed a straightness tolerance of $\frac{1}{2}$ " in any 10' portion of the total strength of seamless copper tubes manufactured in accordance with ASTM Designation B 75.

⁷All this appears from the report dated July 16, 1956, from the commanding officer at the Engineering Procurement Center to the Bureau's Chief of Helium Operations at Amarillo, Texas, to which reference has already been made. This report accompanied the DD-250 transmitted to the Bureau.

pellant's contract with Diehl, a signed DD-250 had to accompany the invoice and shipping papers. If the form had not been signed, Diehl could not have obtained payment of the letter of credit furnished it by the appellant.

After the inspection, Diehl shipped the tubes to Houston, Texas. The shipment was made on July 9, 1956, on the S. S. Barbara Lykes.⁸ When they arrived the Bureau refused, however, to accept the shipment on the ground that the tubes did not comply with the specification requirement of straightness. There is no doubt that, if the contract required the tubes to be manufactured with no greater tolerance for straightness than one hundredth of an inch per foot, they did not meet this requirement, except perhaps for so small a batch of the tubes that it can be disregarded for all practical purposes. Beyond this, however, the record does not show precisely the extent to which the shipment as a whole deviated from absolute straightness. When the inspectors in Germany first raised the question of the straightness of the tubes, Diehl contended that the deviation from absolute straightness was not more than 4", and that it would not have been possible to get the tubes into the boxes in which they were to be shipped if the deviation had been greater. The record indicates, however, that the curvature of the tubes was in general much greater. Apart from the "note" on the copy of Form DD-250 that was transmitted to the Bureau and that put the deviation at approximately 1 foot per 20-foot length, the appellant itself concedes that most of the tubes deviated 4 to 12 inches from absolute straightness, and that in some instances the deviation was as much as 18 inches.⁹ When the shipment of tubes arrived at Wichita Falls, Texas, five to eight boxes of the tubes were opened by the Bureau but the testimony with respect to this examination does not show any more than the tubes, with a few exceptions, were not deemed suitable for the use to which the Bureau intended to put them. However, much later—on November 20 and 21, 1956—a check of six boxes of the tubes was made by a firm of consulting engineers, and the report of the check shows that while "a very small percentage" of the tubes met a straightness tolerance of 1 inch in 10 feet,¹⁰ the tubes generally greatly exceeded this tolerance. However, assuming that the very small number of tubes actually checked were fairly representative of the whole shipment, it would be necessary to conclude that approximately 60 percent of the 20-foot length

⁸ See appellant's letter of July 18, 1956, to the Bureau (Exhibit 11 attached to the contracting officer's findings of fact).

⁹ It would seem probable, however, that the deviation of the tubes was much less than this before they were shipped by Diehl, since they could well have been affected by the handling in the course of shipment.

¹⁰ Apparently at one time after the arrival of the tubes, the Bureau offered to accept them if they conformed to this tolerance.

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tubes did not deviate from straightness more than 12 inches, and that approximately 65 percent of the 12-foot length tubes did not deviate from straightness more than 6 inches.¹¹ Thus the appellant's contentions with respect to the deviation of the tubes from straightness are roughly substantiated.

In fact it would have made no difference, however, if the tubes had deviated from straightness only to the extent of one-half inch per 10-foot length. The reason for the Bureau's emphasis on straightness was that to manufacture the type of heat exchangers that were contemplated tubing that was almost absolutely straight was required. The heat exchangers were to be of the "tube and shell" type. This type of heat exchanger is made by setting up at intervals in a jig a series of baffles, which are metal plates with holes in them, with heads at each end; feeding a small number of tubes through the holes in the baffles; removing this partial assembly from the jig; placing a shell around the assembly; and finally threading the rest of the tubes, which in all numbered 703, through the holes in the baffles and heads. It is the extreme smallness of these holes, which are, moreover, only 78/1000 of an inch apart, and the difficulty of the tube-threading operations that make it necessary for the tubes to be almost absolutely straight. At the time of the making of the contract, the appellant had no knowledge, however, of the manufacturing process involved in the type of heat exchanger contemplated by the Bureau.

After the Bureau declined to accept the tubes, the appellant and the Bureau worked out an arrangement under which the appellant, without waiving any of its rights, agreed to have the tubes straightened to the Bureau's rigorous requirement. As the heat exchangers were to be fabricated by the Wichita Engineering Company of Wichita Falls, Texas, the tubes were shipped out there, and in October 1956, Katz flew out to Amarillo to acquaint himself with the Bureau's requirements in the manufacture of the heat exchangers. The appellant purchased a machine which was used in straightening the tubes and they were finally accepted by the Bureau after they had been straightened. The appellant then filed its claim, which represents the cost of the machine, less its resale value, plus various service and labor charges.

¹¹ Of the six boxes of tubes checked, 3 contained tubes of 20' lengths, and 3 of 12' lengths. It should be noted, however, that while the boxes contained 700 tubes each, only approximately 100 tubes from each of the 20' length boxes were checked, and only approximately 60 tubes from the 12' length boxes were checked. Of the 20-foot tube lengths checked, approximately 11% deviated 4" or less from straightness; approximately 27%, 8" or less; approximately 23%, 12" or less; approximately 21%, 18" or less; and approximately 18%, more than 18". Of the 12-foot tube lengths checked, approximately 9% deviated 2" or less from straightness; approximately 28%, 4" or less; approximately 28%, 6" or less; approximately 25%, 8" or less; and approximately 10%, more than 8".

The appellant bases its claim for recoupment of the cost of straightening the tubes upon two principal contentions. The first is that the tubes were finally accepted before their shipment from Germany, subject only to a subsequent check to determine whether any had been damaged or lost in transit. The second is that the specifications were ambiguous.

The first contention is clearly untenable. Assuming for the sake of argument that paragraph 19 of ASTM Specification B 111-52 was incorporated by reference in the contract, and that it superseded any inconsistent requirements of the inspection procedure specified in paragraph 5 of the General Provisions, so that inspection and approval of the shipment at the place of manufacture would have been final, the Government was not bound to inspect and approve the shipment at that place, for paragraph 5 of the General Provisions expressly provided that failure to inspect should not excuse the contractor from meeting the requirements of the contract, and the inspection of the tubes that was actually made before shipment did not amount to approval. From the circumstances surrounding the inspection, it is perfectly plain that the appellant and Diehl were both perfectly aware that the Bureau did not consider the tubes acceptable, and that the signing of Form DD-250 in the manner in which it was executed was simply a device for enabling Diehl to make shipment of the tubes from Germany without prejudicing the rights of the Bureau. This was made plain not only by blocking out the express words of acceptance from the certification but also by stamping on the form the words "INFORMATION ONLY."

In support of its second contention, the contractor points to the ambiguity of the requirement of straightness. The allegation of ambiguity is based on a variety of considerations, namely: (1) the failure of the specifications to specify any tolerance for straightness; (2) the fact that straightness, which is a relative term, was mentioned as only one of a general set of characteristics applicable to the "workmanship" of the tubes; (3) that commercially, "straightness" means merely not coiled or bent at right angles, and that if straightness is a requirement it is left to negotiation between the purchaser and the supplier; (4) that the Bureau erred in selecting ASTM Specification B 111-52 rather than B 251-54, which did specify a straightness tolerance that might have met the Bureau's needs; (5) that the Bureau, knowing when it accepted the appellant's bid, that the tubes were to be manufactured abroad was under a special duty to make its intention clear but failed to do so until it advised the Army inspectors that straightness was "of paramount importance," which action itself indicated that the specification was not sufficiently clear; and, finally, (6)

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that if the appellant had been notified at the time the order was placed what straightness tolerance would be allowed the requirement could have been met with little, if any, additional cost to the appellant.

The Government contends, on the other hand, that the term "straight" has a perfectly clear and definite meaning, implying virtually absolute straightness, and that if the term could be said to lack clarity, any doubt concerning its meaning was removed by the statement in the specifications that the tubes to be purchased were to be used in the fabrication of heat exchangers. The Government also challenges the appellant's contentions concerning the relevant trade practices.

At the hearing, Katz, when asked what the commercial conception of straightness was, replied:

Of course, that is the crux of the problem. Straightness is merely a relative word. You can have straight, straighter and straightest. But there is no absolute standard as to "straight," and they assume that the workmanship should be such that it is other than coil in form, or have right-angle bends, or anything of that nature. If straightness was of a specific problem, if either the specification should indicate tolerances; that is the normal engineering procedure of doing things. (Tr. p. 54.)

After the controversy in the present case arose, Katz wrote a letter—under date of October 23, 1956—to the Copper and Brass Research Association (commonly referred to as CABRA) in which after referring to the fact that its "Standards" book did not show any straightness tolerances under "Condenser and Other Heat Exchanger Tube," he inquired what tolerances were expected of this type of tube, and what trade custom would be applicable if condenser type tubing should be ordered without specifying specific straightness tolerances.

Under date of November 8, 1956, CABRA replied to this letter, as follows:

In reply to your letter of October 23 in which you ask whether straightness tolerances have been established on condenser and other heat exchanger tube as covered in Schedule TUBE-5 of our Manual of Standards, there are no expected Industry tolerances for straightness on this product. This therefore becomes a matter of negotiation between the mills producing the material and the producer. A number of the mills have straightness tolerances which they apply which in many cases are closer than the straightness tolerances applicable to commercial tube.

To counter the implications of this letter the Government introduced in evidence two letters which it obtained from manufacturers of copper tubes in response to telephone calls from the Bureau. In one of these letters, the American Brass Company, of Waterbury, Connecticut, under date of January 30, 1958, stated:

Except for annealed tubes in coils, all copper tubes are straightened after the final draw. Sizes under about 4 in. O. D. are straightened by staggered, grooved rolls. Larger sizes are straightened by hand or by a hydraulic press.

In the other letter, the Chase Brass & Copper Company, also of Waterbury, Connecticut, under date of January 31, 1958, stated:

Our Copper and Alloy Tubing is put through a straightening operation after drawing. As for the commercial straightness tolerances, we adhere to CABRA, which are as follows:

On Copper and Alloy Tubing $\frac{1}{4}$ to $3\frac{1}{2}$ " O. D.

$\frac{3}{16}$ of an inch in lengths 3 to 6 ft.

$\frac{5}{16}$ of an inch in lengths 6 to 8 ft.

$\frac{1}{2}$ " in 8 to 10 ft. lengths

Over 10 ft. lengths, $\frac{1}{2}$ " in any 10 ft. portion

The Government further offered two purchase orders, dated February 27, 1952, and October 21, 1954, under which it acquired from the American Brass Company a stock of seamless copper tubes that were, according to the testimony of Harold W. Lipper, the Bureau's Supervising Chemical Engineer "essentially straight tubes," and that were used in the fabrication of heat exchangers.

Not too much weight can be given to the trade practice letters, since their authors did not testify at the hearing, and were not subjected to cross-examination. However, insofar as the letters are instructive at all, they tend to support the appellant's rather than the Government's case. It is only the CABRA letter, which is a trade association letter, that can be said to state an industry-wide practice, and that practice seems to be that there are no industry tolerances for straightness, which, therefore, have to be negotiated by the parties in each instance. The letters offered by the Government, on the other hand, merely state the practice of particular mills manufacturing copper tubing. Moreover, the American Brass Company letter does not indicate the degree of straightness which is observed in the manufacture of the tubing. While the Chase Brass & Copper Company letter does mention a specific tolerance, this tolerance would not have been satisfactory to the Bureau; also the tenor of the letter is inconsistent with that of the CABRA letter.

The purchase orders have even less weight. The tubes ordered and obtained under them were entirely 12-foot lengths, and had a greater wall thickness than the tubes which are involved in this case. It is obviously easier to maintain straightness on shorter and thicker tubes. Moreover, the record does not show whether specifications clarifying the need for straightness accompanied the purchase orders. Lipper testified, indeed, that he did not know whether in the case of contracts other than that involved in the present case there had been discussions with the bidders with respect to straightness (Tr., p. 170). And, at

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least in the case of the purchase order of February 27, 1952, the mill making the bid, which was none other than the American Brass Company, significantly specified: "In the event of an award we request that you supply us with *end use in detail for this material.*" [Italics supplied.]

In these circumstances the Board must give special weight to the un rebutted testimony of Katz, who is not only a dealer in aluminum, copper, and brass mill products, but also the holder of a degree in metallurgy from the Massachusetts Institute of Technology, that commercially "straight" tubing would merely signify tubing that was not coiled or bent. Even the officers of the Bureau did not act on the assumption that straightness meant absolutely undeviating straightness. In common parlance the word "straight" certainly does not betoken undeviating straightness. People certainly speak of a line or a pole or a path as being "straight," although it is only fairly straight. And "straight" is an adjective that has comparative and superlative forms. It is a characteristic of copper tubing, moreover, that it is flexible.

As for the Government's contention that the mere statement in the specifications that the copper tubes were to be used in fabricating heat exchangers was sufficient to acquaint the appellant with its requirements, such a contention might have some force if there were a universal type of heat exchanger. But the evidence of record, although not as clear and precise as might be desired, shows at least that there are many types of heat exchangers, including a type in which U-shaped tubes are used, and also that the methods of assembling the tubes vary. The Government witnesses freely conceded that they were not familiar with all conceivable types of heat exchangers. It was no doubt because heat exchangers varied that the American Brass Company, on whose opinion the Government places special reliance, required the Bureau to state "in detail" the end use of the tubes which it was requested to supply.

In the last analysis the Board must regard as decisive the fact that the contracting officer himself acted upon the assumption that the specifications were ambiguous, so far as the requirement of straightness was concerned. Otherwise, he would not have hastened to inform the Army inspectors that straightness was "of paramount importance," and communicated to them the precise tolerance for straightness which he would allow. It is obvious that if the requirement of straightness was of "paramount" importance, it was of supreme importance, and the requirement should not have been left to inference and innuendo. If the requirement of straightness was plain, the contracting officer

would not have had to do any more than to transmit to the inspectors a copy of the specifications, which would speak for themselves.¹²

Corbin states the doctrine applicable in the circumstances of the present case as follows: "The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them."¹³ The Board has applied this doctrine even to acts of subordinates of the contracting officer who interpreted a contract in accordance with the contractor's contentions.¹⁴ Obviously, it applies with even greater force to words of the contracting officer himself. As the contract in the present case was ambiguous, there is for application the familiar rule that the ambiguity must be resolved against the Government, since it drafted the document. Moreover, the Board said in the case to which reference has been made: "The application of this rule is especially called for when the interpretation urged by the contractor was shared by the Government officers administering the contract who gave it the practical construction which the Board has adopted."

The Board must hold that the appellant is entitled to recover the cost of straightening the seamless copper tubes which it supplied under the terms of the contract. The contracting officer is directed to allow the appellant's claim, subject to proper verification of its costs.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer dated July 22, 1957, denying the claim of the appellant, is reversed.

WILLIAM SEAGLE, *Member.*

I concur:

THEODORE H. HAAS, *Chairman.*

MR. SLAUGHTER, dissenting:

I dissent on the ground that a clear preponderance of the evidence shows that the bulk of the copper tubes here in controversy were not

¹² Since the controversy in the present case arose, the Bureau in connection with the fabrication of heat exchangers has been issuing bid invitations for copper tubing that specify the tolerance for straightness. The Board has held, however, that the revision of specifications under other contracts after controversy has arisen does not in itself demonstrate the existence of a serious ambiguity in the original specifications. See *Osberg Construction Co.*, 63 I. D. 180, 187 (1956).

¹³ Corbin on *Contracts*, vol. 3, sec. 558, p. 145.

¹⁴ *Paul C. Helmick Co.*, 63 I. D. 209, 235 (1956).

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straight to a degree that would meet any reasonable or customary standard of permissible deviations from absolute straightness. This is so, whether the acceptability of the tubes be judged by the standard of what the man in the street would consider straight in the light of general experience and common sense, or by the standard of prevailing commercial tolerances of straightness for copper tubing, or by the standard of dictionary definitions of the term straightness, or by the standard of the suitability of the tubes for the end use specified in the contract. In fact, the opinion of the majority disregards or minimizes the evidence presented by the Government to an extent which seems to me to be explainable only on the ground of a desire to encourage precision in the drafting of specifications by denying any real effect at all to general descriptive terms, such as "straight," unless these terms are implemented by specific tolerances expressly incorporated in the contract.

HERBERT J. SLAUGHTER, *Member.*

MAX L. KRUEGER
VAUGHAN B. CONNELLY

A-27522

Decided April 30, 1958

Rules of Practice: Appeals: Dismissal

An appeal to the Secretary will be dismissed where it is withdrawn.

Oil and Gas Leases: Applications

Where land is shown in the tract book as being included in an outstanding oil and gas lease and the lease in fact has been relinquished and a second lease has been issued for the land and also terminated, all without any notation in the tract book of the termination of the first lease and of the issuance and termination of the second lease, the land does not become available for filing subsequent to the termination of the second lease.

Oil and Gas Leases: Applications

Where land is shown in the tract book as being included in an outstanding oil and gas lease and the lease in fact has been relinquished and a second lease has been issued for the land and also terminated, and the tract book shows the termination of the second lease but not the termination of the first lease, the land does not become available for filing subsequent to the notation of termination of the second lease.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Max L. Krueger and Vaughan B. Connelly separately appealed to the Secretary of the Interior from different portions of a decision

dated June 5, 1957, by the Director of the Bureau of Land Management which held that Connelly's oil and gas lease Wyoming 0257 had terminated on August 1, 1956, and which rejected Connelly's lease offer Wyoming 045001 for all the land in the terminated lease and rejected in part Krueger's lease offer Wyoming 043957 for the same land.

On January 29, 1958, Connelly filed a withdrawal of his appeal. Accordingly, his appeal is dismissed. With respect to Krueger's appeal, the pertinent facts are as follows:

Oil and gas lease Wyoming 0257 was issued to L. W. Davis on August 1, 1950, for a 5-year term. On August 5, 1955, the lease was extended for a 5-year period commencing August 1, 1955. Shortly thereafter the lease was assigned, effective November 1, 1955, to Connelly. On August 27, 1956, the seventh year's rental on the lease, which had become due on August 1, 1956, was tendered on behalf of Connelly. On the same day the manager of the Cheyenne land office returned the rental payment, stating that the lease had terminated as of August 1, 1956, because the rental had not been paid on or before that date. The manager also stated that the lease had been canceled on the records of the office at the close of business on August 1, 1956, thus making the land available for leasing at 10 a. m. the next day, and that six simultaneous offers were filed for the land on that day (August 2), with Krueger's offer being drawn as No. 1. Connelly appealed to the Director from the manager's decision but the Director affirmed the manager in his decision of June 5, 1957.

Although the Director affirmed the manager's action with respect to Connelly's lease, he held that Krueger's offer must be rejected in part and possibly in whole. Connelly's lease had covered tracts of land in secs. 2, 11, 15, and 22, T. 26 N., R. 113 W., 6th P. M., Wyoming, and Krueger applied for all these tracts. The Director ruled that as there was no notation in the tract book of the termination of Connelly's lease as to the lands in secs. 2 and 11 at the time when Krueger's offer was filed, the offer must be rejected as to those lands. The Director then held that whether Krueger's offer for the land in secs. 15 and 22 was acceptable depended upon whether those lands were isolated, since the lands comprised less than 640 acres (43 CFR 192.42 (d) and (g) (1) (ii)).

The Director's decision was based upon a photocopy in the record of the tract book pages for secs. 2, 11, 15, and 22. The pages on sec. 15 show an entry which reads as follows: "O & G S $\frac{1}{2}$ W 0257. Terminated 8-1-56." The pages on sec. 22 carry the following entry: "O & G NW $\frac{1}{4}$ NE $\frac{1}{4}$ N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ W-0257 Term 8-1-56." The pages on secs. 2 and 11 carry no entry or notation of any kind with respect to Wyoming 0257.

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In his appeal from the Director's decision, Krueger contended that the Director erred in holding that a notation in the tract book of the termination of Connelly's lease was necessary as to the lands in secs. 2 and 11 before a lease offer could be filed for those lands. He based his contention on the fact that no notation was made in the tract book of the issuance of Connelly's lease. Consequently, he argued, there was no need of noting the termination of the lease since the purpose of the notation rule is simply to clear the tract book of entries of record.

Krueger also asserted that the lands in secs. 15 and 22 are isolated tracts.

An examination of the tract book pages in the record discloses some significant facts to which neither the Director nor Krueger referred. These facts have been called to Krueger's attention and he has commented on them. They appear to require a disposition of this appeal on grounds other than those relied upon by the Director.

Connelly's lease embraced the following tracts of land, comprising 863.19 acres:

Sec. 2: Lots 13, 14, $W\frac{1}{2}SE\frac{1}{4}SW\frac{1}{4}$

Sec. 11: $SW\frac{1}{4}NW\frac{1}{4}$

Sec. 15: $S\frac{1}{2}$

Sec. 22: $NW\frac{1}{4}NE\frac{1}{4}$, $N\frac{1}{2}NW\frac{1}{4}$, $SW\frac{1}{4}NW\frac{1}{4}$, $NW\frac{1}{4}SW\frac{1}{4}$

The tract book pages on sec. 2 carry this entry: "P. P. O. & G. Lots 7, 8, 9, 10, 11, 13, 14 $W\frac{1}{2}SE\frac{1}{4}$, $SW\frac{1}{4}$ " " " [ditto marks showing section, township, and range] See Sec. 5 L. W. Davis." Above this is interlineated "Lease granted April 12-1934—Custer Petroleum Co. Lessee." Across the page is this entry: "Nov. 1, 1922 09156 Permit granted 4-19-24", above which is written "B Lease granted 4-12/34 for S^2 Sec. 15."

The tract book pages on sec. 11 show this entry: "P P O & G. $SW^4 NW^4$, " " " [section, township, and range] See Sec. 15 L. W. Davis." Interlineated above this is "'B' Lease—4/12/34." Across the page is: "Nov. 1, 1922 09156 Permit granted 4-19-24."

Similarly, the tract book pages on sec. 15 carry this entry: "P.P. O & G. S^2 , S^2N^2 " " " [section, township, and range] See Sec. 22 L. W. Davis." Above this is interlineated "'B' Lease for S^2 sec. 15 granted 4/12/34—Custer Petroleum—Lessee." Across the page is: "Nov. 1, 1922 09156 Permit granted 4-19-24. Letter 'N' 4-21-24," above which is written "'B' Lease—April 12 - 1934."

Finally, the tract book pages on sec. 22 show this entry: "P. P. O & G. NW^4NE^4 , SW^4NW^4 , N^2NW^4 , NW^4SW^4 " " " [section, township, and range] 2526.36 [acres] L. W. Davis." Interlineated above is: "'B' Lease 1806.36 [acres] Custer Petroleum Co." Across the page is: "Nov. 1, 1922 09156 Permit granted 4-19-24 'B' Lease dated 4/12/34."

These tract book entries show that all the lands included in Connelly's lease and additional land (in sec. 2) were covered by an oil and gas prospecting permit 09156 issued to L. W. Davis on April 19, 1924, and that these lands were then included in a "B" oil and gas lease issued to the Custer Petroleum Company on April 12, 1934. Except as to lots 7, 8, 9, 10, and 11 in sec. 2, which are lined out, there is nothing at all to show that the "B" lease has terminated in any way. Thus, at the time when Krueger filed his lease offer on August 2, 1956, there were outstanding entries of record in the tract book covering all the lands for which he applied. It would seem, therefore, that no offer could validly be filed for those lands at that time.

Krueger's comment on these facts is that they are immaterial. He asserts that the "B" lease was exchanged for lease Wyoming 0257 and that it was inconsequential whether its termination was noted or not.

Krueger's assertions are not in accord with the facts. The Department's files show that oil and gas prospecting permit Evanston 09156 was issued on April 19, 1924, to L. W. Davis pursuant to section 13 of the Mineral Leasing Act (41 Stat. 441). The permit covered 2526.36 acres, including all the lands involved in this appeal, and was issued pursuant to Davis' application filed on November 1, 1922.

A discovery of oil was made on land in the permit whereupon leases were issued pursuant to section 14 of the Mineral Leasing Act (41 Stat. 442). That section provided that upon a discovery of oil or gas on land included in a prospecting permit issued under section 13 of the act, the permittee would be entitled to a lease carrying a 5 percent royalty rate for one-fourth of the land in the permit and would be entitled to a preference right for a lease carrying a royalty rate of not less than 12½ percent for the remainder of the land in the permit. The 5 percent lease was termed an (a) lease and the 12½ percent lease a (b) lease.

Evanston 09156 (b) was issued as a (b) lease on April 12, 1934, to the Custer Petroleum Corporation, which was an assignee of part of the land in the Davis permit. The Custer lease was for a 20-year term and embraced 1806.36 acres, including all the lands involved in this appeal. In accordance with the practice at the time with respect to (b) leases, the Custer lease carried a restricted drilling clause (section 2 (b)), which permitted the lessee to drill only wells needed to offset drainage unless otherwise authorized or directed by the Secretary. Restricted drilling clauses in (b) leases were deemed to be a suspension of operations and production on the leases pursuant to section 39 of the Mineral Leasing Act, as added by the act of February 9, 1933 (47 Stat. 798). Section 39 provided that in the event of a suspension

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any payment of rental should be suspended and the term of the lease extended by adding the period of suspension. See Circular No. 1294, 54 I. D. 181 (1933), and Circular No. 1341, 55 I. D. 67 (1934).

The Custer lease was therefore in a state of suspension from the date of its issuance, April 12, 1934, until January 12, 1942. On November 4, 1941, Custer was notified by the oil and gas supervisor, Geological Survey, Casper, Wyoming, that the drilling restriction in section 2 (b) of its lease was being terminated effective not later than January 12, 1942. Custer was also informed that benefits accruing under section 39 of the Mineral Leasing Act would terminate as of that date. This meant that the 20-year term of the lease commenced to run, in effect, from January 12, 1942, or to January 11, 1962.

Meanwhile, Custer had made assignments of the entire lease to L. W. Davis. These assignments were approved on January 3, 1942. Thereafter, Davis filed a partial relinquishment of the lease on April 15, 1943. Because of an error in the relinquishment, a second relinquishment was filed on January 29, 1946, which in turn was modified. Finally, on May 23, 1947, the relinquishment was accepted as of April 15, 1943. The relinquishment covered and the lease was canceled as to the particular lands involved in this appeal and, in addition, lots 7, 8, 9, 10, and 11, sec. 2. Davis retained other land in his lease.

In his decision of May 23, 1947, accepting the relinquishment, the Acting Assistant Director of the Bureau of Land Management stated: "No objections appearing the relinquishment is hereby accepted and the lease canceled as to the following described lands * * *. The Acting Manager, District Land Office *will note his records to that effect * * **" [italics added]. As we have seen, so far as the tract book is concerned, a line has been drawn through the description of lots 7, 8, 9, 10, and 11 of sec. 2 but the description of the remaining land in sec. 2 and of all the lands in secs. 11, 15, and 22 has never been touched nor has any notation been made as to the termination of lease Evanston 09156 (b) with respect to those lands.

In the decision of May 23, 1947, approving the partial relinquishment, there were also approved assignments to Bessie B. Minton of the remaining lands in Evanston 09156 (b), none of which is involved in this appeal. Effective June 1, 1948, pursuant to an application filed by Mrs. Minton, an exchange lease was issued to her in accordance with section 17 (a) of the Mineral Leasing Act, as added by the act of August 8, 1946 (30 U. S. C., 1952 ed., sec. 226d).

Then, on November 1, 1949, L. W. Davis filed an application for a lease on the lands involved in this appeal. His application was entitled "APPLICATION FOR RENEWAL AND EXCHANGE OF LEASE, L. W. DAVIS, LESSEE, ACT OF FEBRUARY 25, 1920 (41 STAT., 437) AS AMENDED AND

CIRCULAR NO. 1730, PART 192.60." 43 CFR 192.60 was and is the regulation providing for exchanges of leases under section 17 (a) of the Mineral Leasing Act, *supra*. There was also in the heading of Davis' application a reference to "LEASE SERIAL NO. 09156-B." The application was filed in the Evanston land office and was referred to the Cheyenne land office.

On November 4, 1949, the Cheyenne manager notified the Evanston manager that the lands in Davis' application had been in lease Evanston 09156 (b) which had been canceled as to those lands, and that Mrs. Minton had been issued an exchange lease for the land remaining in Evanston 09156 (b), and that Davis' application could not be carried under that serial number and should be given a current serial number. Accordingly, Davis' application was numbered as Wyoming 0257 and a lease was issued to him under that designation on August 1, 1950.

This detailed recital of the facts as shown by the lease files on Evanston 09156 (b) and Wyoming 0257 clearly establishes, contrary to Krueger's assertion, that Wyoming 0257 was issued as a completely new lease and not in exchange for Evanston 09156 (b). An exchange was an impossibility, for the relinquishment of Evanston 09156 (b) as to the lands later included in Wyoming 0257 had been accepted for more than 2 years prior to the application for the latter lease. There remained on November 1, 1949, no lease for Davis to exchange.

The situation then is that when Krueger filed his offer on August 2, 1956, the tract book showed that all the lands for which he had applied were included in an outstanding oil and gas lease, Evanston 09156 (b).¹ The applicable departmental regulation at the time provided:

* * * (a) Where the lands embraced in a relinquished or cancelled non-competitive lease are not on the known geologic structure of a producing oil and gas field, and are not withdrawn from leasing, such lands become available for, and subject to, filings of new lease offers immediately upon the notation of the cancellation or relinquishment on the tract book * * * [43 CFR, 1956 Supp., 192.43].

This regulation states an ancient rule of the Department that has been followed without deviation since the enactment of the Mineral Leasing Act. See *E. A. Vaughey*, 63 I. D. 85 (1956). Under its plain terms there would appear to be no alternative to rejecting Krueger's offer.

There is one factor here, however, that is not present in the usual tract book notation case. This is the fact that following the actual termination of Evanston 09156 (b) and despite the lack of notation, a new lease was issued for the land which also terminated before

¹ Where reference is made to Evanston 09156 (b) in the remainder of this decision, the reference is only to that lease so far as it covered the tracts involved in this decision and as to which it was relinquished.

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Krueger's offer was filed. Does the intervention of this new lease require or justify a departure from the regulation? The answer to this question requires an examination of the notation rule.

Krueger contends that the notation rule applies only when there is an entry *of record* to write off. He thus implies that the purpose of the rule is to clear the record of entries which no longer subsist. This undoubtedly is the purpose of the rule but the ultimate purpose of clearing the record is to make land available for further disposal. In this connection, the overriding objective of the rule has been to assure to all the public equality of opportunity to file. This has been stated on many occasions. *Germania Iron Co. v. James*, 89 Fed. 811 (8th Cir. 1898), appeal dismissed, 195 U. S. 638; *George B. Friden*, A-26402 (October 8, 1952); *B. E. Van Arsdale*, 62 I. D. 475 (1955); *E. A. Vaughey*, *supra*; *M. A. Machris*, *Melvin A. Brown*, 63 I. D. 161 (1956).

This being the primary objective of the notation rule, to notify the public so that all will have an equal opportunity to file for land, it would be manifestly unfair to say that although there was an outstanding entry of record in the tract book of an oil and gas lease (Evanston 09156 (b)) covering the lands in secs. 2 and 11, no notation of termination of the lease was necessary to open the land to filing because, entirely outside the record, another lease (Wyoming 0257) had been issued and terminated following the termination of the first lease. This would give an unfair advantage to those who by chance knew of the issuance of the second lease. Those who relied on the tract book would have no notice of the second lease but would await the notation of termination of Evanston 09156 (b) in the tract book before filing for the land. It would be no answer to say that others could have ascertained the issuance of Wyoming 0257 by checking the serial register and plats. The fact is that the Department has said that the tract book is the record which will be determinative of whether land is open for filing, and there is no reason why the public should have to resort to other records.

The situation with respect to secs. 15 and 22 is more difficult. In the case of those sections, there was no entry on the tract book of the issuance of Wyoming 0257, but there was a notation of termination of the lease. Was this notation sufficient to overcome the effect of the uncanceled entries in the tract book of Evanston 09156 (b) so that the lands became available for filing despite the existence of the uncanceled entries of Evanston 09156 (b)? I do not think so. If the notation necessarily showed that Evanston 09156 (b) had terminated, I think the answer could be "yes." But the notation did not necessarily show the termination of Evanston 09156 (b). It was noted earlier that if

it had not been relinquished, Evanston 09156 (b) would have had a term running to January 11, 1962. If that lease had been in effect when Wyoming 0257 was issued, the latter lease would have had to be canceled. In that event, the notation of termination of Wyoming 0257 would not have meant that the prior lease had terminated. It is far from infrequent that leases are issued for lands already included in outstanding leases, thus necessitating the cancellation of the later leases.² In those cases the tract book would show the first lease as an outstanding entry and it would show the later lease as having been terminated, the same type of entries as exist in this case with respect to secs. 15 and 22. Since the notation of termination of Wyoming 0257 was completely compatible with the continued existence of Evanston 09156 (b), so far as the tract book is concerned, I do not think it can be held, consistently with the plain language of the regulation requiring notation (43 CFR, 1956 Supp., 192.43), that the notation served to make the lands in secs. 15 and 22 open to filing. Cf. *M. A. Machris, Melvin A. Brown, supra*.

It is regrettable that notation of the relinquishment of Evanston 09156 (b) was not made, especially in view of the instructions in the Acting Assistant Director's decision of May 23, 1947.³ It is particularly astonishing that such notation was not made when Wyoming 0257 was issued. The fact remains, however, that whatever the dereliction on the part of the land office may have been due to, no notation was made. In view of the plain statement in the regulation that land does not become open for filing until notation is made and in view of the overriding purpose of the regulation—to give equal notice to all of the opportunity to file—it cannot be held that the lands in secs. 15 and 22 became open to filing when the notation of termination of Wyoming 0257 was made. It follows that Krueger's offer must be rejected in its entirety.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Director's decision is modified to require the rejection of Krueger's offer in its entirety and as so modified the decision is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

² A recent check made of the land offices in Wyoming, New Mexico, Colorado, and Utah, where oil and gas leasing is heaviest, shows that in the year ending October 1957 there were 61 cancellations of leases in whole or in part because the leased lands were included in prior leases.

³ No reason is apparent why the description of the lands in sec. 2 was partly lined out, as stated earlier, and the remainder of the description of the lands in sec. 2, as well as the descriptions of the lands in secs. 11, 15, and 22, was left untouched.

January 31, 1958

RIGHTS OF ABUTTING UPLAND PROPERTY OWNERS TO CLAIM TITLE TO RECLAIMED LAND PRODUCED BY FILLING ON TIDELANDS AND SUBMERGED LANDS ADJACENT TO THE TERRITORY OF GUAM

Territories—Guam: Generally—Tidelands—Submerged Lands

The settled law applicable to tidelands and submerged lands adjacent to incorporated territories of the United States is equally applicable to the unincorporated territory of Guam.

Territories—Submerged Lands Act: Generally

The Submerged Lands Act (67 Stat. 29), by its express terms, precludes the application of its provisions to territories of the United States.

Territories—Tidelands—Submerged Lands

As a general rule, navigable waters and the soils under them, which is to say tidelands and submerged lands, adjacent to the unincorporated territories of the United States are held in trust by the United States for the use of all of the people, and are not to be granted away in the absence of specific authorization by the Congress.

Tidelands—Submerged Lands

The courts have not differentiated between tidelands and submerged lands, on the one hand, and lands resulting from the filling of such lands on the other, with regard to the acquisition of title to the latter by abutting upland property owners.

Territories—Guam: Generally—Tidelands—Submerged Lands

Abutting upland property owners may not assert a claim of title, as against the United States, to either submerged lands or tidelands adjacent to Guam; nor may they assert similar claims of title as to land which results from the filling of submerged lands or tidelands by such owner, his predecessor, or the United States.

Territories—Guam: Generally

In view of the controlling legal principles relative to tidelands and submerged lands adjacent to a territory of the United States, the language of the Guam Organic Act (48 U. S. C., 1952 ed., sec. 1421f) and transfers of land made pursuant thereto, may not be construed as vesting title or administration of tidelands or submerged lands, filled or otherwise, in the Government of Guam in the absence of specific authorization by the Congress.

M-36449**JANUARY 31, 1958.***

TO THE SECRETARY OF THE INTERIOR.

By letters dated May 10, and June 10, 1957, directed to the Director, Office of Territories, the Governor of Guam has requested assistance in determining the rights of abutting upland property owners in Guam and in determining ownership of tidelands and submerged lands off

*Not released in time for inclusion chronologically.

the coast of Guam. This matter has been referred to this office for consideration.

With regard to this matter, it appears that the Congress by the Guam Organic Act, approved August 1, 1950 (64 Stat. 384, 392, 48 U. S. C., 1952 ed., sec. 1421 *et seq.*), took certain action pertaining to real and personal property belonging to the United States, situated in Guam. This act provided in section 28 (48 U. S. C. sec. 1421f), first, that all property, real and personal, used by the naval government in Guam in the administration of the civil affairs of the inhabitants of Guam, be transferred to the Government of Guam; secondly, that all other property, real and personal, not reserved by the President, be placed under the control of the Government of Guam to be administered for the benefit of the people of Guam; and thirdly, that all remaining property owned by the United States in Guam, not disposed of by the two preceding transfers, be transferred to the administrative supervision of the head of the department or agency designated by the President, i. e., the Department of Interior. Subsequently, pursuant to this act, the Navy Department, by an instrument dated October 23, 1950, transferred to the Government of Guam lands used by the naval government in the administration of civil affairs in Guam. By Executive Order 10178, dated October 31, 1950, the President reserved certain lands in Guam. A portion of the reserved lands were placed under the control of the Secretary of the Navy, and the remainder were placed under the control and supervision of the Secretary of the Interior. The latter lands were transferred to the Government of Guam by the Secretary of the Interior on February 26, 1952. The Guam Organic Act and the transfers of land pursuant to section 28 of that act make no explicit reference to the tidelands or submerged lands with which this opinion is concerned. The question has been raised as to whether the legislation referred to, and actions taken pursuant thereto, have effected a transfer of title to tidelands and submerged lands to the Government of Guam.

Your attention is also invited to section 670 of the Civil Code of Guam (1953), which provides among other things that the Government of Guam is the "owner of all land below tidewater, and below ordinary high-water mark, bordering upon tidewater within Guam * * *"

The questions presented appear to be three in number:

1. In whom is title to the submerged land adjacent to Guam vested?
2. In whom is title to the tidelands adjacent to Guam vested?
3. (a). Without regard to the holder of title, may the adjacent upland owner, through filling of tideland or submerged lands, occupy and perfect title to such "added" land?
(b) May such upland owner occupy and perfect title to such "added" land, where filling of the tidelands or submerged lands was done by the United States?

January 31, 1958

It is my opinion that, for reasons to be set forth below, questions 1 and 2 must be answered by a determination that title to and proprietary rights in the tidelands and submerged lands adjacent to Guam are vested in the United States Government, the aforementioned transfers of land notwithstanding; and that both parts of question 3 must be answered negatively.

It must be kept in mind that the territory of Guam, by the terms of its Organic Act, is an unincorporated territory of the United States (48 U. S. C., 1952 ed., sec. 1421a). In this regard it must be distinguished from the Territories of Alaska and Hawaii, which are regarded as incorporated territories (*Rasmussen v. United States*, 197 U. S. 516 (1905); *Hawaii v. Mankichi*, 190 U. S. 197 (1903)). This difference has been recognized since the decisions in the Insular Cases, beginning with *Downes v. Bidwell*, 182 U. S. 244 (1901).

The law with regard to the ownership of submerged lands and tidelands appears to be well settled with regard to the States and incorporated territories. Unfortunately, however, we have been unable to discover any authority dealing specifically with this problem in an unincorporated territory. I believe, nevertheless, that this settled law may be applied to the unincorporated territory of Guam, since to hold otherwise would result in the granting to such a territory of powers or rights greater than those of the incorporated territories, which would be unreasonable.

Very early in our history, at the time of the acquisition of lands which eventually became States, the Supreme Court of the United States established, through a series of cases, a general rule with regard to the title to submerged lands and tidelands. This general rule was in effect a reiteration of the common law rule which prevailed in England. This rule, as adopted, has been subject to only slight modification with the passage of time and has been applied to the incorporated territories of Alaska and Hawaii in recent years.

In *Shively v. Bowlby*, 152 U. S. 1 (1893), the English common rule was set forth as follows:

By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

Following a lengthy consideration of many authorities, both State and Federal, the Court said further:

The conclusions from the considerations and authorities above stated may be summed up as follows:

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

The Court also pointed out the distinction to be made between public lands generally, and public lands composed of tidelands and submerged lands as follows:

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; * * *

This distinction between public lands, on the one hand, and tidelands and submerged lands, on the other, has been recognized in recent years by State courts in cases involving the States' jurisdiction, as sovereign, over tidelands and navigable waters within their boundaries. In this regard see *Lorino v. Crawford Packing Co. et al.*, 142 Tex. 51, 175 S. W. 2d 410, 414 (1943), in which the Supreme Court of Texas stated that the policy of the State is to dispose of public land to settlers with the exception of navigable waters, which are held in trust for all.

This is not to say, however, that title to such land, vested in the sovereign, may not be transferred to individuals or private interests, since upon acquisition of a territory, the sovereign acquires all rights of legislation and control; but since such title is held in trust for all of the people, such transfer must be made explicit by the Congress.

This is supported further by the Supreme Court in *United States v. Holt Bank*, 270 U. S. 49, 55 (1926), where it said:

* * * It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

The courts have consistently held that neither the President, by Executive order, nor Executive agencies can effect such transfers of title or proprietary rights in tidelands. In this regard see *United States v. Ashton*, 170 Fed. 509 (1909), and *United States v. Lynch*,

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8 Alaska 135, 144 (1929). In the latter case, the Court, in denying Indian rights in tidelands in Alaska included in a reservation of lands for their use, pursuant to legislative authorization, said:

* * * To me it seems apparent that the intention of Congress, in authorizing the Secretary of the Interior to reserve tracts of land for the use of the natives, was to vest in the Secretary a right to reserve uplands, the ownership of which by private persons would include littoral rights which might be used to deprive Indians of landing places. In holding the reservation order void as to tidelands, I do not hold it void as to any uplands that may be included therein.

The Governor's submittal of these questions indicates that at least one area, Baker's Point, which was purportedly transferred by the Navy to the Government of Guam by the October 23, 1950 instrument, is in fact filled tideland. As will appear below, in my opinion, tidelands, even if subsequently filled, remain tidelands as a matter of law. In the circumstances, and in the absence of a definite declaration by the Congress of its intention to authorize the conveyance to the Government of Guam of tidelands, filled or otherwise, I am of the opinion that the attempted conveyance by the Secretary of the Navy of Baker's Point, or of other filled tidelands, was without effect. Additionally, any attempted conveyances by the Secretary of the Interior of filled tidelands, if such exist, would be similarly without effect. The title to such filled lands remains in the United States.

With specific reference to submerged lands, it is to be noted that the Congress, by enactment of the Submerged Lands Act (67 Stat. 29), confirmed and established the titles of the States to lands beneath navigable waters within State boundaries. The term navigable waters was defined in part as "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State * * *." This act, however, by its terms, was limited to "States of the Union" and therefore is not applicable to Guam except insofar as it recognizes the interest of the United States in such lands.

Prior to the enactment of this legislation, the Supreme Court of the United States had held, with regard to submerged lands within the three-mile limit, that such land belonged, not to the States, but to the United States. See *United States v. California*, 332 U. S. 19 (1947). I believe it must be inferred from this holding that the United States would have at least as great an interest in the offshore submerged lands of a territory. As pointed out above, enactment of the "Submerged Lands Act" does not affect the application of the holdings of the Supreme Court in this regard to a territory.

In view of the foregoing, and the nature of the various transfers of land to the Government of Guam alluded to previously, it appears

that such transfers not only did not, but could not have included title to, or administration of, submerged lands or tidelands below ordinary high-water mark adjacent to Guam. It follows from this that title to, and proprietary rights in, such land remains vested in the Government of the United States. Therefore in the absence of a specific reference in section 28 (b) of the Guam Organic Act to tidelands and submerged lands, the lands placed under the "control of the government of Guam" pursuant to that subsection do not and could not include tidelands and submerged lands.

The final question concerns the artificial filling of submerged lands or tidelands and the acquisition of title thereto by upland owners.

It is well settled law that land resulting from natural accretion becomes the property of the upland owner of the property. It appears to be equally well settled that title to land created by the filling of tidelands or submerged lands, in effect artificial accretion, may not be acquired by the upland owner.

The courts of the United States have made no distinction between claims to tidelands, as such, and lands subsequently appearing above high watermark because of the placing of fill, drainage or accretion subsequent to an alleged acquisition while the lands were below the high watermark. In *Weinberger v. City of Passaic*, 84 N. J. L. 149, 86 Atl. 59, 60 (1913), the Supreme Court of New Jersey in denying the claim of a private owner to tideland subsequently filled, said:

* * * It is true that it is not physically land under water at this time, having been filled in, as already noted. It was, however, land under water in 1894, and, in our judgment, is legally such still. The fact that the prosecutor [claimant], or those under whom he claims, or some other person or persons, have, without authority, filled this land in cannot avail the prosecutor as against the rightful claim of the state or its grantees. * * *

See also *Lorino v. Crawford Packing Co. et al.*, 142 Tex. 51, 175 S. W. 2d 410, 414 (1943).

Therefore, it is my opinion that abutting upland owners may not occupy and perfect title as against the claim of the United States to lands resulting from the filling of tidelands or submerged lands adjacent to Guam by the upland owner, his predecessor, or the United States, in the absence of specific authorization by Congress.

In this connection your attention is invited to the Attorney General's letter to you of March 15, 1956, pertaining to the proposed restoration of Sand Island to the Territory of Hawaii by means of an Executive order. A portion of the land considered was land which had been submerged but had subsequently been filled by the United States. In his letter the Attorney General advised, "there is no doubt but that Congressional authority must be obtained before the parcel that is still submerged may be sold. Whether the land

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that has been filled in should be placed in the same category raises a difficult legal question, to which considerable research has disclosed no clear answer." He therefore suggested that the legislation include filled, as well as submerged lands. It should be noted that a decision with regard to the filled land at Sand Island was not made by the Attorney General since it appeared that legislation provided a practical solution in that instance. The filled land considered by the Attorney General in the case of Sand Island is similar to the former submerged lands in Guam which have been filled by the United States and which are considered in the foregoing opinion.

With regard to section 670 of the Civil Code of Guam cited previously, it is my opinion that if, in fact, it purports to have application to the lands under consideration, it may be disregarded to the extent that it is contrary to the conclusions reached herein, since the Guam legislature is without authority to enact such legislation in the absence of Congressional authorization.

Additionally, in connection with the foregoing, I have considered the question whether the submerged lands in question were Spanish Crown lands transferred to the United States pursuant to the first paragraph of Article VIII of the Treaty with Spain of April 11, 1899 (30 Stat. 1754), and whether there exist any private claims to such land predicated on prior Spanish grants which would be protected by the second paragraph of Article VIII of the said treaty. Such paragraphs provide:

In conformity with the provisions of Articles I, II, and III of this treaty, Spain relinquishes in Cuba, and cedes in Porto Rico and other islands in the West Indies, in the island of Guam, and in the Philippine Archipelago * * * immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain.

And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individual may be.

We are advised by the Government of Guam that, while no record exists specifically listing or itemizing the Crown lands transferred to the United States, the lands herein considered have, from the time of the said treaty, been considered to be Crown lands; and further, while it appears that Spanish law would have permitted the granting of an interest in such land to private persons, no such grants are known to have been made and there are no known claims to tidelands or submerged lands adjacent to Guam arising under the prior Spanish Government.

We have also given consideration to the peculiar problem arising in Guam by virtue of the fact that the coastline of Guam consists largely of salt water lagoons subject to the ebb and flow of the tide (estimated at approximately three-fourths of the total coastline). The existence of these lagoons gives rise to the question whether Federal ownership of submerged lands and tidelands is to be measured from the high water mark on the inner shore of such lagoons or from the headlands or reef structures marking the outer limits of the lagoon.

In *People of Porto Rico v. Fortuna et al.*, 179 Fed. 500 (1st Cir. 1922), *cert. denied*, 259 U. S. 587 (1922), the court pointed out that the Spanish Civil Law and the Common Law were identical with regard to this subject and referred to bays and lagoons as "arms of the sea." Under such law the public lands extended inland to the mean high watermark and thereby included all such lands as are subject to the ebb and flow of the tide. It thus appears correct to conclude that ownership of the tidelands here in question by the United States begins at the high watermark on the inner shore, without regard to the presence or absence of lagoons.

ELMER F. BENNETT,
Solicitor.

ACCESS ROAD CONSTRUCTION—EFFECT OF WAIVERS AND DETERMINATIONS GIVEN UNDER PUBLIC LAW 167, 84TH CONGRESS

Rights-of-Way: Generally—Mining Claims: Location—Mining Claims: Patent

Prior to the enactment of the act of July 23, 1955 (69 Stat. 367; 30 U. S. C., 1952 ed., Supp. IV, sec. 601), no right-of-way across a valid, unpatented mining claim which would continue after patent could be initiated solely through construction by the United States. The act above cited which reserved to the United States the right of access across unpatented mining claims was limited in its effect to the period "prior to the issuance of patent" to the claim and cannot be construed to authorize such access across such a claim after issuance of patent.

M-36493

APRIL 23, 1958.*

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

With your memorandum of December 20, 1957, you transmit a memorandum from the Area Administrator, Area 1, with correspondence from the Oregon State Supervisor and a copy of a paper delivered by a member of the Regional Solicitor's Portland Oregon staff. These

*Not in chronological order.

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papers relate to the Government's rights to continue to maintain and use roadways constructed on unpatented mining claims under authority of section 4 of the act of July 23, 1955 (69 Stat. 367; 30 U. S. C., 1952 ed., Supp. IV, sec. 601) [Public Law 167, 84th Cong., 1st sess.] after patent has issued for the mining claims. It appears that the author of the legal paper expresses a doubt that a permanent right-of-way results from such construction and that the Area Administrator has directed that permanent easements be obtained before roads for permanent use are constructed. You ask whether or not I concur with the legal view mentioned and whether the filing and noting in the land office of right-of-way maps would eliminate the necessity for securing easements.

In approaching this question it seems desirable first to determine the nature and extent of the miner's estate in an unpatented mining claim under the laws in force prior to the enactment of Public Law 167 and then to endeavor to determine so far as here pertinent what changes were made in that estate by the enactment of that law.

The Estate Under Laws in Force Prior to July 23, 1955

A valid and subsisting location has the effect of a grant by the United States of the right of present and exclusive possession and enjoyment of the surface and any minerals within, or lodes apexing within the claim. *Belk v. Meagher*, 104 U. S. 279, 285 (1881). The claim is "real property." *Wilbur v. United States ex rel Krushnic*, 280 U. S. 306 (1930); *Bradford v. Morrison*, 212 U. S. 389 (1909). The locator's possessory title is good as against the United States and his property in or on the claim cannot be taken away by the United States except as authorized by law. *United States v. Deasy*, 24 F. 2d 108 (1928); *United States v. North American Co.*, 253 U. S. 330 (1920). Other cases such as *United States v. Rizzinelli*, 182 Fed. 675 (1910), contain the qualification that the right of possession is for mining purposes only. Since the question here considered relates only to claims subject to Public Law 167 and that law obviates the need to apply any such rule, *Rizzinelli* and like cases need not be considered.

So much for the estate as it exists prior to patent. A patent to a mining claim, in addition to conveying the legal title also has a retro-active effect. It relates back to the inception of the patentee's rights. *Heydenfeldt v. Daney etc. Mining Co.*, 93 U. S. 634, 641 (1876). The title relates back to the date of location, *Heydenfeldt v. Daney, supra*; *Smith v. Wheeler*, 5 Alaska 282 (1915); *Gibbons v. Frazier*, 249 Pac. 472 (Utah, 1926); *Hickey v. Anaconda Copper Mining Co.*, 81 Pac. 806 (Mont., 1905). While this relation back is not unqualified, cf. *Hussman v. Durham*, 165 U. S. 144 (1897), it does so to the extent

necessary to cut off claims having their inception after the date of valid location. See *Heydenfeldt, supra*.

In practice the Department has limited its authority to reserve from grants made by patent, road and other rights-of-way constructed with Federal funds to those cases where construction preceded the initiation of the right on which the patent is based. Instructions of August 31, 1915 (44 L. D. 359) and Instructions of January 13, 1916 (44 L. D. 513).

In view of what has been said, it must be concluded that without Public Law 167 there was no right in the United States to construct a road across a valid unpatented mining claim.

The Effect of Public Law 167

Public Law 167 reserves to the United States the right with respect to unpatented mining claims "prior to the issuance of patent therefor, * * * to use so much of the surface thereof as may be necessary * * * for access to adjacent land: * * *" under and subject to certain specified conditions. It is clearly the use of the surface which is limited in time. Thus the conditional right is in terms limited to the period prior to the issuance of patent. In order to provide access for the multiple purposes envisaged by the act roads probably will be necessary and, no doubt, their construction is authorized. "Access" after the issuance of patent is *not* authorized by the act, and without the act it is not authorized.

If any doubt could exist in the face of the express limitation, it would seem to be dissipated by the fact that in the preceding sentence authority to manage the surface resources and dispose of the vegetative resources is also limited to the period "prior to issuance of patent." No one could contend that this management and disposition authority would continue after patent issuance and I know of no basis for ascribing different meanings to identical phrases used in the same section of an act with no slightest indication in the act or elsewhere that they are used in different senses. It should also be noted that section 7 forbids inclusion in the patent of "any reservation, limitation, or restriction not otherwise authorized by law."

The only conclusion possible, therefore, is that a right-of-way across a patented mining claim cannot be based upon construction initiated after the location of the claim, but in such case the right will have to be obtained from the locator, if obtained before patent issues, or from the patentee or his successor in title if obtained after such issuance.

ELMER F. BENNETT,
Solicitor.

*April 30, 1958***APPEAL OF WESTINGHOUSE ELECTRIC CORPORATION****IBCA-134 (Supp.)***Decided April 30, 1958***Contracts: Bids: Generally—Contracts: Interpretation**

When, through clerical error, the continuation sheet makeup of an invitation to bid for the supply of substation equipment and steel framework left doubt as to whether references therein to potheads, cable and conduit were intended to constitute a single subitem or three separate subitems, and the bidder, although on the continuation sheets it expressly excluded only potheads, nevertheless incorporated in the specifications that accompanied its bid an express exclusion of potheads, cable and conduit, the contract resulting from acceptance of the bid must be interpreted as not embracing any of these three categories of materials, even though the acceptance of the bid mentions only potheads as being excluded.

Contracts: Additional Compensation

When a contracting officer erroneously construes the terms of a contract, with the result that the contractor is asked to supply cable and conduit not required by the contract, the contractor is entitled to additional compensation for such materials.

BOARD OF CONTRACT APPEALS

The basic facts and contentions in this appeal are summarized in the Board's decision dated January 30, 1958 (65 I. D. 45), denying the Government's motion to dismiss the appeal. As neither party expressed a desire for a hearing for the purpose of taking testimony or presenting oral argument, the appeal will be decided on the record.

The issue is whether the bid of the contractor, properly construed, required, as the contracting officer held, the furnishing by the contractor, without additional compensation, of the cable and conduit, listed on pages 3 and 4 of the continuation sheets of the invitation to bid, which bore the number L 09-57-524.

The appellant maintains that neither its bid nor any contract arising out of its acceptance can be construed properly to require the contractor to deliver the cable and conduit. It argues that the subitems for these materials were an integral part of the subitem for potheads, which it excluded from its bid by express language on the continuation sheets. It also argues that its intent to exclude the cable and conduit was evinced by the specifications which it submitted along with its bid.

The continuation sheets of the invitation to bid contained three items on which bids were requested. Item No. 2 was divided into twenty unnumbered subitems. The last three subitems were for, respectively, 7 potheads, 1750 feet of cable, and 1500 feet of conduit. Opposite each of the first eighteen subitems, that is, down to and including the subitem for potheads, was the word "Total" in a column entitled "Quantity," and a line for the insertion of the bidder's price in another

column.¹ The cable and conduit subitems at the end of the list had neither the word "Total" nor a line for the insertion of the price, and were the only subitems so treated. Because of this fact, the contractor asserts that the last three subitems were, in reality, only one subitem. Items Nos. 1 and 3 were not divided into subitems. Each of the three items included a line for the insertion of the total price bid on that item.

The contractor filled in the continuation sheets by inserting a price on the total price line for Item No. 1, by inserting the words "No bid" on the price line for the potheads subitem of Item No. 2, by inserting the words "Total items 2 and 3 above, except potheads," followed by a price, after Item No. 3, and by writing at the bottom of the last page of the continuation sheets the following:

Note: We are not including the 7 potheads of page 3 in our bid. It is presumed that these may be obtained through a local supplier or contractor.²

The contractor made no insertions on the price lines for any of the first seventeen subitems of Item No. 2, nor on the total price lines for either that item or Item No. 3.

The Government admits that the continuation sheet makeup for the cable and conduit subitems was, through clerical error, at variance with the makeup employed elsewhere in those sheets. On the other hand, the contractor chose to disregard the makeup of the continuation sheets in that it did not insert prices on the price lines opposite the seventeen subitems of Item No. 2 on which it intended to bid, nor on the total price line for that item. Had it inserted such prices, as the makeup of the sheets contemplated, the figures for the seventeen subitems would presumably have added up to a sum that equalled the figure given as the total price of Item No. 2, thereby making manifest that cable and conduit as well as potheads were intended to be excluded from the bid.

The dispute over the meaning of the continuation sheets thus stems in part from the manner in which they were prepared by the Government and in part from the manner in which they were filled in by the contractor. If these sheets were the only contract documents that might be considered to be indicative of an intent by the contractor to exclude cable and conduit from its bid, it could well be questioned whether they would provide a basis for resolution of the dispute in favor of the contractor.

The contractor, on the same day on which it returned to the Government the filled-in invitation to bid with its accompanying continuation

¹ The fifth subitem included the line for the price, but omitted the word "Total." This presumably was because the subitem encompassed only a single article.

² Both the potheads and the cable subitems appeared on page 3 of the continuation sheets; the conduit subitem appeared on page 4.

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sheets, also submitted two specifications describing the materials it proposed to furnish or supply under the bid. These were required by paragraph 8 of the contract specifications, which provided:

DATA TO BE FURNISHED BY THE BIDDER: Each bidder shall submit with his proposal, his own detail specifications and outline drawings showing arrangement and controlling dimensions for the equipment he proposes to furnish. He shall also submit a complete list of all control equipment which he proposes to supply, giving the manufacturer's name and catalog number; and a complete set of catalogs and cuts which thoroughly illustrate and describe each piece of equipment. Proposals that do not comply with these requirements may not be considered.

The contractor's specifications were submitted by a covering letter which commenced with the words: "This letter will refer to and become a part of our bid on your Invitation #L 09-57-524."

One of the two specifications so submitted dealt with power transformers, which formed the subject matter of Item No. 1 of the invitation. The other described materials that corresponded to those called for in the first seventeen subitems of Item No. 2 and in Item No. 3. The final paragraph of this specification stated:

The following equipment is not included in this specification:

- a. Power transformers.
- b. Oil circuit breaker control wiring and conduit and control power source.
- c. Substation lighting and lighting conduit and wiring.
- d. Fence.
- e. Grounding material.
- f. *Potholes and underground power cable and conduit.*
- g. Foundations and reinforcing steel. [*Italics supplied.*]

We think the quoted provision calls for a conclusion that the contractor's bid did not include cable and conduit. The specification, which became a part of the bid by virtue of the terms of the letter submitting it to the Government, says that it does not include underground power cable and conduit, the very type of cable and conduit covered by the last two subitems of Item No. 2. Analysis of the other items mentioned in the quoted provision supports this conclusion. Since the power transformers were dealt with in another specification, the reason for the insertion of item "a" is obvious. Items "b", "c", "d", "e", and "g" deal with materials that were not expressly listed on the continuation sheets, and that under a fair interpretation of the contract as a whole probably would not come within any of its provisions, but that, nevertheless, either because of references to these materials in the contract drawings or because of the generality of the language used in some of the contract provisions, might conceivably be claimed to be materials which the contractor was required to supply. As there is no other specification covering these items, the only reasonable explanation for the presence of the exclusionary language with respect to them is that the draftsman desired to close the

door against any future argument to the effect that the contract bound the contractor to supply the materials enumerated in these items. This is also the only convincing explanation for the presence of item "f."

In short, we think the quoted provision clearly manifests an intention on the part of the contractor to define and delimit the obligations it was assuming by expressly excluding items that it did not intend to furnish or—in the case of item "a"—did not intend to furnish twice. Moreover, the fact that the specification was submitted in response to a requirement of the Government that each bidder provide detailed information concerning the equipment he "proposes to furnish" or "proposes to supply" buttresses the conclusion that the exclusion of the cable and conduit was not just an exclusion from the specification itself, but was an exclusion from the proposal of the contractor to furnish or supply the materials covered by the invitation for bids.

The contracting officer accepted the contractor's bid by a telegram which stated that the award was for Items Nos. 2 and 3 "not including the seven potheads." This was confirmed by a purchase order which used the expression "except for potheads."

The Government contends that this phraseology should have put the contractor on notice that the contracting officer read the contractor's bid as not excluding cable and conduit. This contention appears to be unrealistic in the light of the fact that virtually the same language had been used by the contractor in the continuation sheets. If, as the evidence on the whole indicates, the contractor, when it inserted the word "potheads" on the continuation sheets, regarded that word as a sort of shorthand expression for "potheads, cable and conduit," the contracting officer's references to potheads would hardly have suggested to the contractor that the contracting officer was doing anything more than agreeing to the exclusion of potheads, cable and conduit in the same shorthand terminology the contractor had used. Furthermore, it is clear from the contract drawings that the cable and conduit were not for the purpose of interconnecting the various pieces of electrical equipment to be furnished under the contract, but were to run from the potheads to a pumping station the equipment for which was not covered by the contract. Thus, appellant's assertion that by evincing on the continuation sheets an intent to exclude the seven potheads it also evinced an intent to exclude the cable and conduit, to which the potheads alone out of the various items of equipment listed in the invitation would be physically attached, is not without some measure of logical and practical support.

There is, however, a more fundamental reason for rejecting the contentions of the Government based upon the language of the award telegram and the purchase order. This is not a case where both parties have signed a document that purports to set out the entire contract between them, and, therefore, is not a case where the bid would come

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within the application of the rule that the terms of a contract, if unambiguous, prevail over the terms of the bids, negotiations, or other preliminaries that led up to the execution of the contract. Rather, this is a case of a contract resulting from an offer-and-acceptance. The Government, by the award telegram and purchase order, simply accepted the offer made by the contractor's bid. Neither the award telegram nor the purchase order purported to set forth the entire contract and, therefore, neither of them can be considered as being the contract, of and by itself, or as having been made such by reason of the fact that the contractor signed the acknowledgment of receipt printed on the purchase order form. The offer in this case included not only what was said in the invitation to bid and the continuation sheets, but also what was said in the specifications prepared by the contractor and made a part of its bid.

While the proper construction of the bid is not wholly free from doubt, the Board considers, particularly in the light of the express exclusion of cable and conduit from the accompanying specifications prepared by the contractor, that the bid must be interpreted as not embracing the cable and conduit subitems. As the contract does not entitle the Government to delivery of the materials covered by those subitems, but it appears that they have already been delivered to the Government, payment should be made for them.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer holding that the contractor was required under the terms of the contract to furnish cable and conduit, is reversed.

THEODORE H. HAAS, *Chairman.*

We concur:

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

MRS. ETHEL H. MYERS

A-27560

Decided May 5, 1958

Mining Claims: Lands Subject to—Withdrawals and Reservations: Power Sites

Prior to passage of the act of August 11, 1955, lands embraced in power site withdrawals were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power site purposes but prior to passage of the act of August 11, 1955, is null and void unless the land em-

braced in the claim was restored to entry under section 24 of the Federal Power Act at the time of location.

Mining Claims: Lands Subject to—Withdrawals and Reservations: Generally

A mining claim is properly declared null and void where the location was made at a time when the land embraced in the claim was included in a proposed withdrawal of the land which would exclude location under the mining laws, and where notice of the proposed withdrawal was recorded on the serial register and tract books of the land office—the notation having the effect of segregating the lands included in the proposed withdrawal from location under the mining laws to the extent that the withdrawal, if effected, would prevent such disposal.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Ethel H. Myers has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated August 21, 1957, which affirmed the decision of the manager of the Portland, Oregon, land office, dated December 9, 1955, declaring the White Oak and Anchorage placer mining claims null and void.

The adjoining claims were first located along the Rogue River in Oregon in 1926 by Mrs. Myers' predecessors in interest. New notices of location of the claims by Mrs. Myers on August 11, 1955, reciting that the claims were located under the mining laws of the United States (30 U. S. C., 1952 ed., sec. 21 *et seq.*), were filed for record in Josephine County, Oregon, on September 19, 1955, and copies of the new location notices were received in the Portland land office in October 1955.

The manager held the claims to be invalid under the 1926 locations because the land embraced in the claims was at that time withdrawn and reserved as a power site. He held that the act of August 11, 1955, known as the Mining Claims Rights Restoration Act of 1955 (30 U. S. C., 1952 ed., Supp. V, secs. 621-625), does not validate mining claims which had been located prior to the passage of that act on lands which were at the time of location withdrawn for power site purposes. He held further that Mrs. Myers' new locations of the claims were invalid because the land was at the time of her attempted locations segregated from location by a proposed recreational withdrawal which had been filed in the Portland land office on April 1, 1955.

In affirming the decision of the manager, the Acting Director stated that under a departmental regulation (43 CFR 295.10) ¹ the proposed withdrawal effectively segregated the land included in the proposal from all forms of appropriation under the public land laws, including the mining laws, from the time notice of the proposal was recorded in the serial register and noted on the plats and tract books of the land

¹ The regulations relating to applications for the withdrawal or reservation of Federal lands were revised on August 12, 1957. The particular regulation cited by the Acting Director now appears as 43 CFR, 1954 Rev., 295.11 (Supp.).

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office. He held that, since the locations made in 1955 were subsequent to the effective date of the segregation, the land embraced in Mrs. Myers' claims was at that time withdrawn from the operation of the mining laws and therefore that the claims were null and void.

In her appeal to the Secretary the appellant states that she and her deceased husband received a quit claim deed to the claims in 1926; that they conscientiously did the required amount of assessment work each year; that it was not until 1954 that they learned that the local land office did not consider the claims to be valid because they had been located after the land embraced therein had been reserved as a power site; that the act of August 11, 1955, restored the land to mining entry; that she thereupon relocated the claims in her own name; that notice of the proposed withdrawal was not published in the Federal Register until December 22, 1955; and that on November 19, 1956, she had made a formal protest to the State Supervisor against the withdrawal of the land because of the improvements made on the land and labor performed for the benefit of the claims over the years.

Nothing in Mrs. Myers' appeal warrants any change in the decision of the Acting Director.

Prior to the passage of the act of August 11, 1955, land withdrawn or reserved for power sites was not subject to mining location unless the land had been restored to entry under section 24 of the Federal Power Act (16 U. S. C., 1952 ed., sec. 818). *Harry A. Schultz et al.*, 61 I. D. 259 (1953). Nothing in the present record indicates that the land included in the White Oak and Anchorage placer mining claims had been so restored. Therefore the locations made in 1926 were made at a time when the land was not subject to mining location. The act of August 11, 1955, does not open to mining location all lands theretofore reserved or withdrawn for power sites but only so much of those lands as come within the scope of the act. The act does not validate mining claims located prior to the date of the act on land which, at the time of location, was withdrawn for power site purposes. *Day Mines, Inc.*, 65 I. D. 145 (1958). Accordingly, it was correct to hold that the White Oak and Anchorage placer mining claims were null and void under the locations made in 1926.

While the land was so withdrawn, on April 1, 1955, an application was filed by the Director of the Bureau of Land Management with the manager of the Portland land office that this and other land in the vicinity of the claims be, subject to valid existing rights, withdrawn from all forms of appropriation under the public land laws, including the mining laws, and reserved, except for leasing under the Small Tract Act (43 U. S. C., 1952 ed., Supp. V, sec. 682a-e) and lease and sale under the act of June 14, 1926, as amended (43 U. S. C., 1952 ed., Supp. V, sec. 869 *et seq.*), for recreational purposes. The withdrawal

of lands adjacent to the Rogue River was sought to protect and preserve the scenic and recreational value of those lands from despoliation by any entry or application incompatible with those objectives.²

The regulations of the Department in effect at that time (43 CFR 295.9-295.11) authorized the heads of Federal or State agencies desiring lands of the United States to be withdrawn or reserved for the use of their agencies to file applications for such withdrawals or reservations with the manager of the land office for the area in which the land was situated, indicating in their applications whether the withdrawal or reservation should preclude, among other things, mining locations on the land. They provided, as the Acting Director stated, that the recording in the serial register and the noting on the official plats and in the tract books maintained by the land office for the area of information indicating that an application for the withdrawal or reservation of the particular lands had been filed would temporarily segregate such lands from any disposition which would be inconsistent with the withdrawal, if made. There was no requirement that notice of the filing of such applications must be published in the Federal Register.³

The recording and noting required by the regulation were what segregated the land. The land was thereafter reserved from disposition under those public land laws, including the mining laws, which would be inconsistent with the use which the Bureau of Land Management intended to make of the land until such time as either (1) the Secretary denied the Director's application, or (2) the Secretary determined that the withdrawal should be made, and had issued a public land order to that effect. 43 CFR 295.11 (b) and (c).

Neither determination had been made when Mrs. Myers made her 1955 locations on the land. The land was at that time temporarily reserved from mining location. It is to be noted in this respect that section 2 of the Mining Claims Rights Restoration Act of 1955 (30 U. S. C., 1952 ed., Supp. V, sec. 621) provides that nothing therein shall affect the validity of withdrawals or reservations for purposes other than power development. Accordingly, it must be held that that act did not open the land embraced in Mrs. Myers' claims to mining location, and that the claims covered by those locations are without validity. (*Cf. A. W. Kimball et al.*, 65 I. D. 166 (1958).)

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

² See 20 F. R. 9868.

³ The 1957 revision of these regulations requires the publication in the Federal Register of a notice of the filing of such an application. 43 CFR, 1954 Rev., 295.12 (Supp.).

*May 7, 1958***APPLICABILITY OF PROPOSED REGULATIONS REQUIRING MODIFICATION OF ELECTRIC FACE EQUIPMENT IN GASSY COAL MINES****Regulations: Generally—Mines and Mining—Bureau of Mines**

The Bureau of Mines, pursuant to section 5 of the act of May 16, 1910, as amended (36 Stat. 369; 30 U. S. C., 1952 ed., sec. 7), and sec. 212 (a) of the Federal Coal Mine Safety Act (66 Stat. 692, 709; 30 U. S. C., 1952 ed., sec. 482 (a)), has the authority to revise existing regulations or to promulgate new regulations affecting equipment in gassy coal mines whether previously certified as permissible or not, provided, (1) the regulations affect equipment acquired and certified as permissible subsequent to July 16, 1952, and not excluded by the provisions of section 209 (f) (1) of the Federal Coal Mine Safety Act; (2) a finding and determination is made by the Bureau based on facts and circumstances not conclusions that the equipment is not experimental but is a demonstrated safety device designed to decrease or eliminate mine fires and explosions caused by the use of such equipment in gassy coal mines; and (3) that the provisions of the Administrative Procedure Act (5 U. S. C., 1952 ed., secs. 1001-1011) are followed.

M-36508**MAY 7, 1958.****TO THE DIRECTOR, BUREAU OF MINES.**

In accordance with your request, we have reviewed a proposed memorandum to the Assistant Director, Health and Safety, on the subject, "Development of an integral automatic methane detector for permissible electric face equipment." The need to develop such a device to prevent ignitions from electrical sources of explosive gas is discussed in the memorandum, which you intend to release to several organizations outside the Government.

You have inquired whether authority exists to issue regulations prescribing additional specifications to which electric face equipment theretofore certified as permissible must conform in order to continue to be permissible for use in gassy coal mines.

The Department has followed the provisions of the Administrative Procedure Act (5 U. S. C., 1952 ed., secs. 1001-1011) in promulgating regulations concerning the certification of permissible coal mining equipment and accessories, thus affording manufacturers of the equipment and other interested parties an opportunity to offer suggestions and recommendations concerning proposed regulations.

Section 209 (f) (1) of the Federal Coal Mine Safety Act of July 16, 1952 (66 Stat. 692, 706; 30 U. S. C., 1952 ed., sec. 479 (f) (1)), provides in part as follows:

(f) Electrical equipment.

(1) All electric face equipment used in a gassy mine shall be permissible, except that electric face equipment may be used in a gassy mine even though such equipment is not permissible if, before July 16, 1952, or the date such mine became a gassy mine, whichever is later, the operator of such mine owned such equipment, or owned the right to use such equipment, or had ordered such equipment.

It is clear that any amendment of the regulations cannot have the effect of applying the directive of the statute to any equipment covered by the exception.

I

The authority of the Department to issue rules and regulations governing the testing and certification of equipment as permissible is derived from section 5 of the act of May 16, 1910, as amended (36 Stat. 369; 30 U. S. C., 1952 ed., sec. 7), and section 212 (a) of the Federal Coal Mine Safety Act (66 Stat. 692, 709; 30 U. S. C., 1952 ed., sec. 482 (a)). The right, which Congress imposed, to issue such rules and regulations includes the authority to revise them or to promulgate different ones affecting equipment not exempt by statute and not already certified as permissible, since a delegation of power carries with it the authority to do whatsoever is reasonable and appropriate properly to effectuate the power.¹

It is not so clear, however, that authority exists to issue new regulations prescribing different specifications to which equipment previously certified must conform in order to continue to be classed as permissible. We are aware of no applicable decisions construing the statutes previously cited particularly section 212 (a) of the Federal Coal Mine Safety Act.

A somewhat comparable law is the Boiler Inspection Act of February 17, 1911, as amended (36 Stat. 913; 45 U. S. C., 1952 ed., secs. 22-34), pertaining to railroads. The act prohibits, under penalty, the operation of locomotives and appurtenances, unless they are in proper condition and safe to operate in the service in which the same are put. The rulemaking power of the Interstate Commerce Commission, which is responsible for the administration of the act was questioned. In disposing of the issue, the Supreme Court ruled that the act imposed on the Interstate Commerce Commission responsibility for adequate safety rules and granted to the Commission the power of not only disapproving rules proposed by carriers but also of requiring modifications of rules then in force.² The Commission's

¹ *McCulloch v. Maryland*, 17 U. S. 315 (1819); *Gallagher's Steak House v. Bowles*, 142 F. 2d 530 (2d Cir. 1944); *cert. den.*, 322 U. S. 764 (1944); see also *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370 (1932); *American Trucking Associations v. United States*, 344 U. S. 298 (1953).

² *United States v. B. & O. R. Co.*, 293 U. S. 454 (1935).

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order,³ which amended the rules so as to require the substitution of different equipment on steam locomotives was set aside, however, because of the failure of the Commission to make a specific finding of fact that the substitution of power-operated for hand-operated reversing gear in steam locomotives was essential to remove "unnecessary peril to life or limb" as provided in the act. Subsequently, the Supreme Court, in construing the same act, held that its provisions requiring that all parts and appurtenances of locomotives shall be kept in proper condition and safe to operate do not apply to safety devices which are placed on a carrier for experimental purposes.⁴

Also in the field of transportation, recent examples of the authority of the Department of the Treasury and the Interstate Commerce Commission to issue regulations providing for different safety standards to which previously approved equipment must conform may be found in volume 23 of the Federal Register at pages 1964⁵ and 2218.⁶

Moreover, the rule has been pronounced that a Federal administrative agency promulgating regulations to effect a valid purpose is not required to maintain a position once adopted if another is found necessary or desirable, notwithstanding losses may be caused individuals within the field of interstate commerce.⁷

II

It also may be observed that the regulations governing the specifications of permissible electrical equipment in coal mines provide, among other things, that the Bureau reserves the right to rescind for cause

³ The Commission in its report made the following findings as a basis for the issuance of the order (footnote No. 6 in 293 U. S. at pp. 463, 464):

"On the record in this case we conclude and find that the safety of employees and travelers on railroads requires that all steam locomotives built on or after April 1, 1933, be equipped with a suitable type of power-operated reverse gear.

"We further find that all steam locomotives used in road service built prior to April 1, 1933, which weigh on driving wheels 150,000 pounds or more, and all steam locomotives used in switching service built prior to April 1, 1933, which weigh on driving wheels 130,000 pounds or more, shall have such power-operated reverse gear applied the first time they are given repairs defined by the United States Railroad Administration as class 3, or heavier, and that all such locomotives shall be so equipped before January 1, 1937.

"We further find that air-operated power reverse gear should have a suitable steam connection so arranged and maintained that it can quickly be used in case of air failure.

"An appropriate order amending our rules for the inspection and testing of steam locomotives and tenders and their appurtenances to give effect to these findings will be entered."

⁴ *Southern Ry. Co. v. Lunsford*, 297 U. S. 398 (1936).

⁵ The regulations concern various items of life saving and fire fighting equipment, installations and materials used on merchant vessels, motorboats and other pleasure craft subject to inspection by the Coast Guard.

⁶ The regulations concern specific standards for certain equipment on locomotive units under the provisions of the Boiler Inspection Act (45 U. S. C., 1952 ed., sec. 22) as amended.

⁷ *Continental Distilling Corp. v. Humphrey*, 220 F. 2d 367 (C.A.D.C., 1954); see also *Queenside Hills Realty Co. v. Sawt*, 328 U. S. 80 (1946).

an approval or certification previously granted (30 CFR 18.31-18.34). Section 18.34 of the regulations provides as follows:

§ 18.34 *Approvals*— * * * (d) *Withdrawal of approval*. The Bureau reserves the right to rescind for cause, at any time, any approval granted under the regulations in this part.

The section is mentioned merely to indicate that there has been some notice to interested parties that an approval once issued is not permanent.

III

In summary, it is our opinion that the regulations in question may be amended from time to time provided: (1) the regulations affect equipment acquired and certified as permissible subsequent to July 16, 1952, and not excluded by the provisions of section 209 (f) (1) of the Federal Coal Mine Safety Act; (2) a finding and determination is made by the Bureau based on facts and circumstances, not conclusions, that the equipment is not experimental in nature but is a demonstrated safety device designed to decrease or eliminate mine fires and explosions caused by the use of such equipment in gassy coal mines; and (3) that the provisions of the Administrative Procedure Act (5 U. S. C., 1952 ed., secs. 1001-1011) are followed.

ELMER F. BENNETT,
Solicitor.

MATANUSKA VALLEY LINES, INC., ET AL.

A-27545

Decided May 12, 1958

Rules of Practice: Hearings—Public Sales: Sales under Special Statutes— Alaska: Sales

In proceedings under Private Law 654 (84th Cong., 2d sess.), purchasers of land under the Alaska Public Sale Act who have paid the full purchase price for the land and who assert that they have performed the requirements for receiving patents on the land will be granted a hearing on the question whether they have complied with those requirements.

Regulations: Validity

Where in a private law Congress requires that a party, in order to obtain certain relief, be found to have complied with the requirements of a statute and the regulations issued thereunder, the validity of the regulations is not open to attack in a proceeding to determine compliance.

Alaska: Sales

Where no time for beginning or completion of structures is stated in approved plans of proposed use of land purchased under the Alaska Public Sale Act, the determination as to what building program was required is dependent

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upon what reasonably could have been completed during the 3 years following issuance of the certificates of purchase, considering such factors as physical conditions attending building and the finances of the purchaser.

Alaska: Sales

In order to be entitled to a patent for land purchased under the Alaska Public Sale Act, a purchaser need show only substantial compliance, not complete compliance, with his land utilization program.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Matanuska Valley Lines, Inc., an Alaska corporation, and Russell Swank and Joe Blackard have appealed to the Secretary of the Interior from a decision of July 3, 1957, by the Director of the Bureau of Land Management denying them additional time for filing patent applications for lands offered at auction under the Alaska Public Sale Act (48 U. S. C., 1952 ed., secs. 364a-364e). That act permits the sale at public auction of certain lands which have been classified by the Secretary as suitable for industrial or commercial purposes, including the construction of housing, in tracts not exceeding 160 acres in the aggregate, to any bidder who furnishes satisfactory proof that he has the bona fide intention and the means to develop the tract for such use. The Alaska Public Sale Act was intended to stimulate the industrial and commercial development of Alaska by making lands for such use more rapidly available than had been possible previously, and various provisions of the statute were intended to assure that land disposed of under the act be sold to persons having the financial means and bona fide intention of developing it for use for the purposes for which it was classified and to prevent speculation in the lands sold under the act. 48 U. S. C., 1952 ed., secs. 364a-364c, 364e; *Matanuska Valley Lines, Inc., et al.*, 62 I. D. 243, 248-250 (1955).

On June 8, 1951, 6 tracts containing approximately 9 acres of land described as tracts 1, 2, 3, and 4, block 27, and tracts 6 and 7, block 34, East Addition, townsite of Anchorage, were offered at the first auction held under the act. The Matanuska Valley Lines, Inc., was the successful bidder for tracts 1, 2, 3, 4, and 7, and Joe Blackard and Russell Swank, operating a joint adventure, were the successful bidders on tract 6. The appellants paid a total purchase price of \$28,500 for the tracts.

Section 3 of the act (48 U. S. C., 1952 ed., sec. 364c) provides that a certificate of purchase shall be issued to each purchaser and that:

* * * Within three years after issuance of such certificate, upon proof supported by affidavits of two disinterested persons that the purchaser has used the land for the purpose for which it was classified for sale for a period of not less than six months, a patent in fee shall be issued. * * *

Departmental regulations (43 CFR 75.19-75.36) issued under the

act require, *inter alia*, that the successful bidder must file an acceptable showing as to the proposed program of use and development of the land (land utilization program) consistent with the general purpose for which the land was classified, and provide that if the successful bidder is qualified and has the intention and financial means to develop and use the land in accordance with the act and his proposed utilization program, a certificate of purchase will be issued by the manager (43 CFR 75.30, 75.31 (a)). After issuance of the certificate, which will be valid for a period of 3 years from the date of issuance, the purchaser shall have the right, during the 3-year period, to enter upon, occupy, use, and make improvements on the land in accordance with the declared utilization program (43 CFR 75.31 (b)). An application for patent may be filed at any time after 6 months and before the expiration of 3 years from the date of issuance of the certificate of purchase. The application for patent must include a showing as to the nature and cost of improvements and structures placed on the land showing substantial compliance with the declared land utilization program, and the use, dates, and periods of use of the land which must aggregate not less than 6 months. Affidavits of two disinterested persons, based upon their own knowledge, that the land has been used for the purpose for which it was sold for an aggregate period of not less than 6 months must be furnished with the patent application (43 CFR 75.34). If at the end of 3 years from the date of issuance of the certificate there is not pending an application for patent, all rights under the certificate of purchase terminate, the certificate will be of no further effect, and no money paid on the certificate can be returned. No extension of time for compliance with the certificate of purchase may be granted (43 CFR 75.33).

Plans submitted by the appellants showing proposed use and improvement of the tracts were approved, and on August 20, 1951, certificates of conditional purchase on the tracts bid for by Matanuska Valley Lines, Inc., were issued to it and a certificate of conditional purchase on tract 6 was issued to Joe Blackard and Russell Swank. The manager of the Anchorage land office held in decisions of September 7 and 8, 1954, that all rights under these certificates of conditional purchase had terminated because no applications for patents on the tracts had been filed by August 20, 1954, three years after the certificates were issued. On March 30, 1955, the Associate Director of the Bureau of Land Management affirmed the manager's decisions and also rejected the appellants' applications filed January 31, 1955, for patents on the tracts because they were not timely filed.

In a decision on appeal from the Associate Director's decision, *Matanuska Valley Lines, Inc., et al. (supra)*, the Department held that the Alaska Public Sale Act and the regulations issued under the

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act require that proof of use of the land for the purpose for which it was classified for sale be submitted within 3 years after issuance of a certificate of purchase, and that the Department could not modify the statutory provision governing the time within which such proof must be submitted. The decision held further that the Department was not authorized to issue patents under the Alaska Public Sale Act to holders of purchase certificates who did not submit proof as to use of the land or applications for patent until more than 5 months after the period required by the statute, and that the Department has no authority to refund the purchase price paid for land sold under the act.

Thereafter, on May 18, 1956, Private Law 654 (84th Cong., 2d sess.) was approved. Section 1 of the act provided:

That, if the Secretary of the Interior finds that the Matanuska Valley Lines, Incorporated, pursuant to its certificate of conditional purchase issued on August 20, 1951, for tracts 1, 2, 3, and 4 of block 27 of the east addition to the original townsite of Anchorage, Alaska, and tract 7 of block 34 of the east addition to the original townsite of Anchorage, Alaska, complied, prior to August 20, 1954, with the provisions of the Alaska Public Sales Act of August 30, 1949 (63 Stat. 679; 48 U. S. C., secs. 364a-364e), and the regulations issued pursuant thereto, except for the requirement pertaining to the application for the issuance of a patent, he shall grant to the Matanuska Valley Lines, Incorporated, such additional period of time within which to file such application for the aforesaid tracts as he shall deem reasonable. [70 Stat. A67.]

Section 2 made the same provision with respect to Joe Blackard and Russell Swank and tract 6.¹

Subsequently, in a decision of October 23, 1956, involving only tract 1, the acting manager of the Anchorage land office reinstated the certificate of conditional purchase as to that tract after determining that the purchaser had substantially complied with the provisions of the Alaska Public Sale Act in developing and using the tract as planned for at least 6 months before August 20, 1954. An application for patent on tract 1, supported by the required affidavits, had been filed on January 31, 1955, more than 5 months after the termination date of the certificate of purchase. In accordance with Private Law 654 the time within which the purchaser was required to submit patent application was extended to January 31, 1955, to obviate the necessity for the purchaser's filing a new patent application. A final certificate was issued on November 21, 1956, and patent to the tract was issued on April 8, 1958.

¹ As originally introduced, H. R. 7513 (which, as amended, became Private Law 654) directed the Secretary to convey the tracts to the purchasers without further compensation. In a letter of December 20, 1955, to the Chairman of the House Committee on Interior and Insular Affairs from the Assistant Secretary of the Interior, this Department recommended that the bill be amended by granting an extension of time for the purchasers to comply with the terms of the purchase agreement. The recommendation was adopted by the House of Representatives. However, when the bill reached the Senate, the Senate amended it to provide as stated above (S. Rept. 1821, 84th Cong., 2d sess. (1956)).

In three separate decisions of October 23, 1956, the acting manager denied additional time within which the appellants might file applications for patents on tracts 2, 3, 4, 6, and 7, on the basis of determinations that the purchasers had not, prior to August 20, 1954, substantially complied with the requirements of the statute and regulations in developing and using the lands as planned. The acting manager held that all rights to the land and privileges under the certificates of conditional purchase terminated on August 20, 1954, and that no money paid for purchase of the land would be refunded. He allowed the appellants 90 days in which to remove all improvements, materials, and structures from the land.

The Director's decision of July 3, 1957, from which the present appeal is taken, affirmed the acting manager's decisions with respect to tracts 2, 3, 4, 6, and 7.

The appellants contend in this proceeding that in determining whether they have used the land for the purpose for which it was classified, they are entitled, as a matter of due process, to notice and an opportunity to be heard on the question. The Director's decision denied the request for a hearing, stating that allowance of the request was within the discretion of the Director as provided by regulation (43 CFR, 1954 Rev., 221.6 (Supp.)), and added that the reports of field examination together with the appellants' affidavits and the original applications for patent were regarded as containing sufficient evidence on the issue to be decided, and that there appeared to be no reasonable likelihood that a hearing would develop facts decisive of the issue. The Director's decision cited in support of the denial of the request for a hearing the decision in the case of *Margaret A. Andrews, Charles B. Gonsales*, 64 I. D. 9 (1957), a case in which a request for a hearing was denied on the question whether an oil and gas lease application had been filed before the notation in the tract book of the relinquishment of a prior lease. However, the cited case is not comparable to the instant case in which the appellants claim equitable title to tracts 2, 3, 4, 6, and 7 because they have paid the full purchase price for the land, have spent large amounts of money in improving the tracts, and believe that they have complied with the requirements entitling them to patents on the tracts; and in which they assert that they should

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have an opportunity to be heard before a forfeiture of their interest in real property is declared.²

It is unnecessary to decide the question whether under the terms of Private Law 654 the appellants are entitled to a hearing in connection with the Department's determinations as to compliance since, in any event, the Department believes that the appellants' request for a hearing should be granted and will remand the case for a hearing in accordance with the rules of practice governing contest cases (43 CFR, 1954 Rev., 221.69-221.77 (Supp.)).

The appellants also assert that the regulatory provisions relating to forfeiture of the purchasers' rights are unreasonable, confiscatory, unlawful, and, in effect, that the regulatory requirement that the appellants prove that the land was developed in substantial compliance with plans submitted to local officials is not in accordance with the statute which requires only that the appellants prove that they used the land for 6 months for the purpose for which it was classified. Private Law 654 required that the Secretary find that the appellants had complied, before August 20, 1954, with the statute "*and the regulations issued pursuant thereto*" (*italics added*). The express requirement of a finding of compliance with the regulations issued under the act makes inappropriate, in this proceeding, consideration of the validity of the regulations, because their incorporation into Private Law 654 amounts to an implied legislative ratification of them (see *Hassett v. Welch*, 303 U. S. 303, 314 (1938); *Maddux et al. v. United States*, 20 Ct. Cl. 193, 198 (1885)).

² In support of the patent applications the following amounts were listed as having been spent on the tracts:

Tract	Purchase price	Cost of improvements
2-----	\$4,000.00	\$8,961.95
3-----	4,500.00	12,367.80
4-----	5,000.00	14,894.20
6-----	4,500.00	15,869.64
7-----	6,500.00	13,384.65
Total purchase price-----	\$24,500.00	
Total cost of improvements-----		\$65,478.24

Exhibit G submitted on appeal is an affidavit dated August 15, 1956, by Russell Swank and Joe Blackard concerning use and improvements on the tracts and includes itemized statements of the cost of improvements on the tracts. The statement in this exhibit entitled "Tract Two (2) Block 27" contains the items and costs shown for tract 3 in Exhibit C which was filed with the application for patent, and Exhibit G submitted with this appeal does not contain an itemized list showing the cost of improvements on tract 2. Other than this presumably inadvertent mistake and omission the statements as to improvement costs in this affidavit are identical with statements submitted with the patent applications.

It is also contended on appeal that in determining whether the appellants substantially complied with the declared land utilization program, an incorrect standard was used in measuring substantial compliance. This contention requires consideration of several provisions of the Alaska Public Sale Act and of the related regulations.

As was pointed out above, under section 1 of the act, land which the Secretary has classified as suitable for industrial or commercial purposes, including the construction of housing, may be offered for sale, but before a patent may be issued for the land, section 3 of the act requires proof that the purchaser "has used the land for the purpose for which it was classified for sale for a period of not less than six months * * *." The act contains no express requirement that improvements be constructed on the land but it recognizes that some development may be necessary. Thus, section 1 provides that land can be sold to any bidder who furnishes proof satisfactory to the Secretary that he "has the bona fide intention and the means *to develop* the tract for use" (italics added). Also, section 1 provides that one purpose for which land may be sold is the construction of housing. Obviously a purchaser could not show use of land for the construction of housing without constructing housing. Thus, the required use upon which issuance of a patent depends *may* involve the placing of improvements on the land.

The regulations issued under the act recognize this. 43 CFR 75.30 provides, *inter alia*, that before a certificate of purchase may issue, the successful bidder must file an acceptable showing as to the proposed program of use and development of the land, consistent with the general purpose for which it was classified, containing in substance the detailed information required by 43 CFR 75.24. The latter regulation provides:

Land utilization program; statement and plat. (a) The application must be accompanied by an additional statement executed by the applicant disclosing in detail the proposed use to which the land will be put, containing in substance the following information: Type (whether industrial, commercial, or housing); structures and other improvements to be erected on the land, including size and cost of construction; approximate dates for beginning and completing construction; or, in the case of housing, the number of separate housing units or the number of persons or families for whom accommodations will be provided.

(b) The applicant must also furnish a plat of the area desired for purchase, showing the proposed location of all structures, roadways, and other improvements and facilities to be erected, in sufficient detail to illustrate the contemplated utilization of the tract and the need for all the acreage for which application is made.

43 CFR 75.34 governing applications for patents provides in pertinent part that:

Application for patent; proof of use. (a) * * * The application must include a showing as to the nature and cost of the improvements and structures placed

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on the land showing substantial compliance with the declared land utilization program; and the use, dates, and periods of use of the land which must aggregate not less than six months.

(b) There must be furnished with the application the affidavits of two disinterested persons, based upon their own knowledge, that the land has been used for the purpose for which it was sold for an aggregate period of not less than six months. In addition, the approved holder may submit, if he desires, or he may be required by the manager to submit any other evidence which will constitute satisfactory proof that the land has been utilized for such purpose for the required period.

Analyzing the requirements of the statute and regulations, it appears that a purchaser must meet the following requirements: First, he is required to furnish a land utilization program showing, among other things, the structures and other improvements to be erected on the land, including approximate dates for beginning and completing construction. Then, after issuance of the certificate of purchase and within 3 years thereafter, the purchaser must show, in an application for patent, that he has placed improvements and structures on the land in "substantial compliance" with the land utilization program. He must also prove at least 6 months use of the land for the purpose for which it was sold, which proof must be supported by the affidavits of two disinterested persons and by any other evidence which the manager may require. These are the requirements that the Secretary, under Private Law 654, must find compliance with prior to extending the appellants' time within which to file applications for patents to the tracts involved.

The first question to be determined, therefore, is what land utilization program was furnished by the appellants. In three substantially identical letters of June 12, 1951, covering the various tracts, the manager wrote to the appellants notifying them that they were the successful bidders for these tracts and requiring, among other things, that the appellants file

a showing as to the proposed use of the tracts involved; a general description of the improvements to be placed thereon, including sketches showing the location thereof. The foregoing must be accompanied by a showing that the corporation is financially prepared to complete the proposed project within a period of three years.

In response to this request the appellants filed on July 9, 1951, statements and sketches showing the proposed development of the tracts. The statements in relevant part are as follows:

* * * Attached hereto are sketches of the tracts in question showing the proposed uses.

We propose to erect on Tract #1 and portion of Tract #2 a Trailer Park with Utility Buildings, Storage Shed, Water and Sewer Lines. Due to future expansion of the Bus Company, this area will have to be occupied by the Bus

Company and a trailer park will be easier to move than some other type of construction or business.

The balance of Tract #2, 3 & 4 will be used for Bus company operations. We propose to build immediately a 75 x 100 basement garage. Future expansion is a 2nd floor, 150 x 150. In addition, we propose to have a fueling station, parking areas for coaches, emergency vehicles and employees automobiles. Parking areas and driveways are to be paved and the entire area to be landscaped and fenced.

Tract #7 will be used directly in connection with the Bus company. We propose to erect a warehouse, shed for road maintenance equipment, used parts shed and have space for salvage and dead line buses. Entire area is to be graded, landscaped and fenced.

We would appreciate any comments you might have on the proposed uses and advise if not sufficient to comply with the requirements.

In a separate letter regarding tract 6, Mr. Swank stated:

* * * Attached hereto is sketch of the tract in question showing the proposed use of the area.

We propose to use this area principally for the warehousing and distribution of Firestone Products and petroleum products by the Northland Oil Company. We propose to erect a warehouse 40 x 100 for the distribution of packaged oil by the Northland Oil Company which will also have office space. We propose to erect a 50 x 100 warehouse and dock for Firestone tires and appliances. In addition, we intend to erect a barrel storage shed for barrelled goods. Make available parking areas for trucks and trailers. Have garage facilities for trucks. Construct a warehouse and used parts shed and have storage for use[d] tires and cars.

A portion of the proposed use is pending on the possibility of getting the Alaska Railroad to run a spur track to the property on 1st Avenue.

Your attention is also called to the fact that a portion of this tract bordering [sic] on East H Street will be difficult to use due to the terrain. The entire area is to be graded, landscaped and fenced.

Any comments you might have on the proposed use will be greatly appreciated and it is hoped that the above is sufficient to comply with requirements.

The appellants assert, and there is nothing in the record suggesting the contrary, that no comments on the sufficiency of the proposed plans were ever received by the appellants. On the contrary, a memorandum in the files, dated July 9, 1951, from Victor Fischer, townsite planner, Region VII, to the Regional Administrator, states in part as follows:

Having examined the proposed utilization program and layouts as shown in the attached material, it is my opinion that they meet the requirements of showing full utilization of the land as set forth in 43 CFR Part 75. Having talked to Mr. Swank it is further my opinion that he will fully carry out his improvements as shown in the attached plan.

Mr. Fischer recommended issuance of the certificates of purchase and the Regional Administrator approved the recommendation.

This memorandum covered tracts 1, 2, 3, 4 and 7. There is in the case files no comparable memorandum covering tract 6.

The appellants' utilization program lacked one crucial detail called for by the regulations, namely, the approximate dates for beginning

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and completing construction of the structures and other improvements proposed. The acting manager's and the Director's decisions are based on the premise that all of the structures and improvements outlined in the declared land utilization program were to have been completed within the 3-year period for which the certificates of purchase were issued. However, there is little in the case files to establish the correctness of that premise. The appellants did say that they proposed to build "immediately" a 75 x 100 basement garage. Other than that, they simply "proposed" to build this and that structure. Some of the proposals were obviously relegated to the indefinite or uncertain future. Thus, of the basement garage they said: "Future expansion is a 2nd floor, 150 x 150." Also, in connection with tract 6 they stated that a portion of the proposed use "is pending on the possibility of getting the Alaska Railroad to run a spur track to the property on 1st Avenue." It is true that in his letters of June 12 the manager asked for a showing that the appellants were "financially prepared to complete the proposed project within a period of three years," thus perhaps implying that the appellants should submit a showing only of what they proposed to complete in 3 years. However, the fact remains that the case files contain no clearcut showing as to what the appellants agreed to complete within 3 years.

This does not mean that the appellants are to be held only to the construction of the basement garage within 3 years. It means that it will be necessary to determine what part, if not all, of their program could reasonably have been completed within 3 years. In making this determination, it seems necessary to consider several factors, including such factors as the physical conditions under which construction would necessarily take place and the financial condition of the appellants at the time their program was presented. Obviously if the building program submitted by the appellants was of such magnitude that it could not reasonably have been completed within 3 years under the physical conditions prevalent, it could not reasonably be said that the appellants had agreed to complete it within 3 years. Likewise, if the appellants demonstrated at the time they submitted their plans lack of financial means to complete the program within 3 years, they could not reasonably be said to have agreed to complete it within 3 years.

With respect to physical conditions, the appellants contend that all of the evidence and relevant factors have not been given proper weight. They stress the shortness of the Alaska building season and the condition of the tracts at the time of purchase as having been minimized or completely ignored in determining whether they had complied with the requirements for obtaining patents on these tracts. Certificates of conditional purchase were issued on August 20, 1951.

The appellants assert that no construction work could have been performed during the 1951 season and that the acting manager ignored the fact that outside construction work can be performed only during approximately 5 months of each year. Inasmuch as no dates for completion of structures were indicated in the plans for land utilization, the length of the season during which outside construction work can be performed in Alaska is one of the circumstances which should be considered in further proceedings in this case in determining the amount of work which could reasonably be expected to have been completed between August 1951 and August 1954.

With respect to preliminary work on the tracts, the appellants assert that they constructed at least 5 roads requiring an extensive amount of grading, leveling, and filling; they leveled hills ranging from 65 feet to 100 feet in height on portions of several tracts; a gravel pit dug by the city of Anchorage in previous years occupied parts of two lots and had to be filled; portions of other lots were swampy and required draining and filling; and other excavation work had to be completed before the tracts could be used for any purpose. A number of affidavits submitted with the appeal and in support of the patent applications corroborate the assertions as to the large amount of preliminary excavation, filling, and leveling work which had to be performed on these tracts before the land could be used.

It would be unreasonable to expect the appellants to erect structures on the land without first performing the essential preliminary work such as leveling, grading, filling, draining, and building access roads necessary to use the land. As no date for completion of all of the improvements proposed in the purchasers' land utilization program was agreed upon, the time and work necessary in preparing the tracts for use should be weighed in further proceedings in this case in determining the extent of improvements which could reasonably be expected to have been completed between August 20, 1951, and August 20, 1954, and therefore covered by the appellants' utilization program.

As for the financial condition of the appellants, the case files contain no pertinent information although the manager had requested in his letters of June 12, 1951, a showing that the appellants were financially prepared to complete the proposed project within 3 years. If the appellants did show that they had the finances to complete all that was included in their proposed plan within 3 years, and the project was physically capable of completion within 3 years, it could reasonably be concluded that the project was to be completed in 3 years. However, if they had shown finances available for only part of the project, that fact would be significant that the project was not to be completed in its entirety within 3 years.

Since the case files lack sufficient evidence upon which to make a

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determination as to what land utilization program could reasonably have been completed within the 3-year period following issuance of the certificates of purchase, that determination will have to be made.

Once that determination has been made, it is necessary next to ascertain whether there was substantial compliance with the plan of utilization as thus determined.

Substantial compliance is a less strict requirement than exact or complete or specific compliance. It means performance of the essential requirements for accomplishing the purpose of an agreement, and the test of substantial compliance in performance of a contract is whether the other party received substantially the benefit he expected (*Newcomb v. Schaeffler*, 279 P. 2d 409, 412 (Colo., 1955)). What constitutes substantial compliance depends on the facts of each particular case, and substantial compliance with a statute may be shown if it appears that the purpose of the statute has been served (see *Kasner v. Stanmire*, 155 P. 2d 230, 232 (Okla., 1944); *Trussell v. Fish*, 154 S. W. 2d 587, 590 (Ark., 1941)). The ultimate purpose of the agreement here under consideration is *use* of the land for 6 months in accordance with its classification and the test of substantial compliance is to be related to this purpose.³

In further proceedings in this case involving the determination as to whether the appellants substantially complied with the declared land utilization program, it is important to establish whether the land was used for the required period essentially in accordance with the proposed use program. The fact, however, that structures and improvements may deviate in size, location, or other respects from the development plans originally proposed by the purchasers does not, as a matter of law, necessarily amount to a failure to show substantial compliance because the concept is not rigid and is to be related to the statutory objective of *use* of the land which it is intended to implement. The development of a tract by constructing buildings precisely as proposed without any additional use of land would not necessarily fulfill the statutory requirement of use.

³ The certificates of conditional purchase issued to the appellants provide that in the event "full compliance" has not been made with the act and regulations thereunder, and an application for issuance of patent has not been filed within three years from the date of the certificate, then the certificate shall be void and of no further effect, all rights under the certificate shall terminate, and no money paid shall be refunded.

Appellants contend that the requirement of "full compliance" in the certificates is invalid. This assertion is erroneous because the provision requires full compliance with the act and regulations. The regulation (75.34) requires substantial compliance with the declared land utilization program. Consequently, the certificate requirement of full compliance with the act and regulation means substantial compliance with the declared land utilization program, as the regulation requires, and use of the tract for the purpose for which it was classified for sale for a period of not less than six months, as the statute requires.

The evidence upon which the decisions denying additional time for filing patent applications was based included aerial photos of the tracts taken on September 3, 1954, several snapshots taken from the ground on September 7, 1954, supplemental field reports of August 15 and 16, 1956, and the material submitted by the purchasers in support of patent applications. Mention in the Director's decision of a field report of September 14, 1954, may refer to a memorandum of that date by the real property officer which accompanied aerial photos and the snapshots taken on September 3 and 7, 1954. The memorandum is not a report of a field examination, and the only reports of field examinations in the case files are of the examinations made on August 15 and 16, 1956. There is no report of a field examination of tract 4 in these records.

The appellants question the sufficiency of the evidence upon which a number of the determinations affecting substantial compliance were based. A review of the records indicates that the adequacy of the evidence to support the conclusions about partial use of the tracts by the appellants is particularly doubtful. The statement in the Director's and acting manager's decisions to the effect that several of the tracts had been insufficiently used between 1951 and 1954 to satisfy the statutory requirement of 6 months' use is based, as far as the record on this appeal discloses, upon an aerial photograph taken September 3, 1954. (The snapshots taken on September 7 show individual structures and improvements, but give no indication of use of the tracts as a whole.) The aerial photograph indicates the condition of the several tracts, the structures thereon, and the extent of occupation and development of each tract at the moment the photo was taken (10 a. m., September 3, 1954). It has only very limited value as evidence of the extent of use of the tracts over any 6 months of the 3-year period between August 20, 1951, and August 20, 1954. In further proceedings in this case a distinction should be made between evidence showing development of the tracts and evidence of use of the tracts over a period of time.

After reviewing the detailed evidence submitted on appeal regarding the improvements completed on each tract and the extent and use of the tracts, the Director's decision cannot be affirmed as to any of the tracts on the ground that appellants' statements show that they did not substantially comply with their declared land utilization program because substantial compliance cannot be tested until the amount of work (including the work necessary in preparing the tracts for use) which may reasonably be expected to have been completed during 3 years (i. e., the land utilization program) is determined. There is insufficient evidence in the case records to decide what proportion of the improvements proposed by the purchasers

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in 1951 may reasonably be expected to have been completed within 3 years given the amount of preliminary work which was done on the tracts and considering the other circumstances already discussed. Moreover, there are conflicts in the evidence regarding the improvements actually made on the tracts and the extent of use of the tracts, and determination of these matters is to be properly resolved at a hearing. It should also be mentioned that the appellants' bona fide intent to use and develop the land in accordance with the objective of the statute apparently is unquestioned, and, in the circumstances, their equities in the tracts should not be defeated except upon firm evidence that they have not developed and used the tracts in the manner required for obtaining patent.

To recapitulate, it is necessary to have a hearing for the purpose of determining (1) what part, if not all, of the land utilization program proposed by the appellants could reasonably be completed within the 3-year period, and (2) whether there was substantial compliance by the appellants within the 3-year period of such program as is determined to be reasonably possible of completion during that period. The hearing is to be conducted pursuant to the rules governing hearings in contest cases (43 CFR, 1954 Rev., 221.69-221.77 (Supp.)).

For the reasons discussed herein and pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the case is remanded to the Bureau of Land Management for action consistent with this decision.

ELMER F. BENNETT,
Solicitor.

WILLIAM V. MOORE

A-27540

Decided May 13, 1958

Oil and Gas Leases: Applications—Oil and Gas Leases: Relinquishments

An oil and gas application filed prior to the notation on the appropriate tract book of the relinquishment of a prior lease on the land applied for must be rejected because the land is not available for further leasing until such notation is made.

Oil and Gas Leases: Applications—Regulations: Applicability

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even though the notation on the tract book of the existence of a prior lease may not have been made until the same date that a relinquishment of the lease was noted, and an application filed prior to the notation of the relinquishment is prematurely filed and must be rejected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On October 23, 1953, William V. Moore filed a noncompetitive oil and gas lease offer, Montana 012262, under the provisions of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 181 *et seq.*). Part of the land applied for was described as follows:

T. 29 N., R. 8 W., M. P. M., Montana

Section 29: S $\frac{1}{2}$ S $\frac{1}{2}$

" 32:N $\frac{1}{2}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$

" 33:NW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$

On December 1, 1954, the manager rejected the application as to this land—

* * * for being in conflict with oil and gas lease Montana 0105 issued September 1, 1950, canceled by relinquishment May 5, 1953, relinquishment not noted on tract book at time oil and gas offer Montana 012262 filed. In accordance with 43 CFR 192.43 the lands concerned were not available for further oil and gas leasing until after the relinquishment had been noted on the tract book. * * *

Moore appealed to the Director, Bureau of Land Management, from the manager's decision, and in a decision dated June 5, 1957, the Director affirmed the manager's decision. The present appeal to the Secretary of the Interior is from the Director's decision.

The decision in this case turns on the construction to be given to the following regulation which, at the time the appellant filed his offer, read in pertinent part:

Sec. 192.43 *Opening of land to further filings, where a noncompetitive oil and gas lease is canceled or relinquished.* Where a noncompetitive lease is canceled or relinquished and the lands involved are not on the known geologic structure of a producing oil or gas field or are not withdrawn from further leasing, *immediately upon the notation of the cancellation or relinquishment on the tract book of the land office* [Italics added] * * * the lands shall be open to further oil and gas lease offers. (43 CFR 192.43.)

The facts appear to be as follows: The land involved in this appeal was included in oil and gas lease Montana 0105 issued September 1, 1950, for a 5-year term. The appellant contends that "On May 13, 1953, [sic] the Serial Register Book for lease M-105 (the prior lease in question) has the following notation: 'Lease cancelled by relinquishment as of May 15, 1953, Tr. Bk. noted May 19, 1953, 8:50HR'" and that on August 20, 1954, the serial register for lease M-105 had the notation: "above notation of relinquishment was noted in the tract book for T. 28N, R. 8W. balance of land in T29N. R8W. tract book noted lease cancelled by relinquishment as of 5-5-53, tract book noted 8-20-54 at 3:10 p. m." The appellant asserts that when he filed his application on October 23, 1953, the serial register showed the May 13, 1953, entry, and a pencil line had been drawn through the oil and gas plat in the plat book indicating the prior lease had terminated. The

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appellant further asserts that at the time he filed his application there was no entry in the tract book to show the existence of lease M-0105, and that the first and only entry as to that lease was made on August 20, 1954, at the same time the relinquishment was noted.

Put simply, the appellant's position is that at the time when he applied for a lease, the relinquishment of prior lease Montana 0105 was shown on both the serial register and the plat book. The issuance and existence of the lease were not shown on the tract book until August 20, 1954, on which date a notation was made of the issuance of the lease and its relinquishment at the same time. He contends therefore that the tract book rule, exemplified in 43 CFR 192.43, is inapplicable to his situation.

In the past several years, the Department has had several occasions to rule on the applicability of the tract book rule to oil and gas offers filed in the Montana land office. Without exception, the Department has held that until a notation is made on the tract book of the relinquishment of a prior lease, the land in the lease is not open to filing and offers for the land must be rejected.¹ Notation of relinquishment in the serial register and plat book is not sufficient.

These rulings would dispose of this appeal except for one factor, which has not previously been considered by the Department. That is the appellant's contention that when the issuance of a lease is not shown on the tract book and the lease is terminated by a relinquishment, no notation of the relinquishment on the tract book is necessary in order to make the land again available for filing.

There is some merit to this contention. Inherent in the tract book rule is the premise that the tract book is *the* source from which the public is to determine whether public lands are open to filing. Although the serial register and plats are also public records (43 CFR 240.1, 240.13), "[t]he fact is that the Department has said [in 43 CFR 192.43] that the tract book is the record which will be determinative of whether land is open for filing, and there is no reason why the public should have to resort to other records" (*Max L. Krueger, Vaughan B. Connelly*, 65 I. D. 185 (1958)). This being the case, it may be argued with reason that if some one interested in filing on a particular tract should examine the tract book and see no notation of any outstanding lease, he should be able to file an offer for that land. Of course, if the land in fact is in an outstanding lease, the offer would have to be rejected. But if the land had been included in a lease, which was not noted, and the lease had been terminated by relinquish-

¹ *Ralph J. Fuchs*, A-27295 (March 27, 1956); *Halvor F. Holbeck*, A-27300 (May 14, 1956); *M. A. Machris et al.*, 63 I. D. 161 (1956); *Edgar C. Hornik*, A-27340 (September 19, 1956); *Edward A. Gribi et al.*, A-27420 (March 4, 1957); *Willie M. Cortes et al.*, A-27438 (June 10, 1957); *John Snyder*, 64 I. D. 353 (1957); *Lily L. Pearson et al.*, A-27505 (November 15, 1957).

ment prior to the filing of the offer, it might not appear unreasonable to permit such filing to be made.

However, "the overriding objective of the [tract book] rule has been to assure to all the public equality of opportunity to file." *Max L. Krueger, supra*. Thus, in cases where the issuance of a lease has been noted on the tract book and the lease is later relinquished but the relinquishment of the lease is noted only in the serial register and plats and not on the tract book, the Department has indicated that it is unfair to allow persons gaining knowledge of the relinquishment from the serial register or plats to file for the relinquished land. This because others, knowing of the tract book rule, may be waiting for the notation to be made on the tract book before filing. See *Max L. Krueger, supra*; *M. A. Machris, supra*; *Willie M. Cortes, supra*. Conversely, if the issuance of a lease was not noted on the tract book but someone learned of the issuance of the lease and its subsequent relinquishment by examining the serial register or plats and waited for the notation of relinquishment to be made on the tract book before filing for the land, it would be unfair to him to permit another person, who had examined only the tract book and found no entry of any lease, to file for the land before a notation of the relinquishment is made in the tract book.

The governing regulation in this case (43 CFR 192.43) in plain terms stated that land in a canceled or relinquished lease would become available for the further filing of offers immediately upon the notation of the cancellation or relinquishment on the tract book.² It did not provide for an exception where the issuance of the relinquished or canceled lease was not noted on the tract book. Even where no such notation of issuance was made, the regulation literally provided that a notation of relinquishment or cancellation would have to be made before the lands became open again for filing. The Department has said that a person is entitled to rely upon the plain unambiguous language of the regulation without having to speculate on the possibility of an unwritten exception to the regulation. *M. A. Machris, supra*. That statement would appear applicable to this case.

Considering the purpose of the rule embodied in 43 CFR 192.43, it is deemed proper that persons discovering the failure to note the issuance of a prior lease on the tract book and ascertaining the relinquishment of that lease from the serial register or plat records should be compelled to await the notation of the relinquishment of the prior lease on the tract book so that all persons may have an equal opportunity to file offers to lease the land. Consequently, it must be held that the appellant's application was prematurely filed and was properly rejected.

² This regulation was recently modified but the amendment does not affect this proceeding. 43 CFR, 1954 Rev., 192.43 (Supp.).

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In holding that the rejection of the appellant's offer was proper, it is not intended that approval be given to the reasons stated in the Director's decision for sustaining the rejection. The Director's decision was based on the *Machris* decision, *supra*, which the Director said was controlling. The *Machris* case dealt with a situation where a lease was relinquished during its 5-year term but the notation of relinquishment was not made until after what would have been the expiration of the 5-year term and an offer for the land was filed after that date (expiration of the 5-year term) but before the notation of relinquishment was made. In the present case, the appellant's offer was filed (on October 23, 1953) and the relinquishment was noted (on August 20, 1954) both within the 5-year term of lease Montana 0105 (September 1, 1950, to August 31, 1955). The *Machris* case therefore involved entirely different facts.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director, Bureau of Land Management, sustaining the rejection of appellant's offer is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

CHARLES H. McCHESNEY ET AL.¹

A-27630

Decided May 28, 1958

Grazing Permits and Licenses: Generally

Determinations of the carrying capacity of the Federal range within a grazing district, of the commensurability of base property, and of proper seasons of use of the range are within the discretion of the range manager, and his determinations will be accepted where there is no showing of error, discrimination, or arbitrariness.

Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Special District Rules

Where, on appeal from a range manager's award of grazing privileges for the 1953 and 1954 seasons, a hearing examiner determined the applicant's class 1 grazing privileges in accordance with the priority period designated in the range code, and thereafter a special rule with respect to the range involved was adopted which rule changed the priority period upon which class 1 privileges were to be determined for the future, the correctness of the hearing examiner's determination becomes moot.

Grazing Permits and Licenses: Generally

Where the renewal of a grazing permit was not denied to an applicant for grazing privileges and there is no evidence that the value of the applicant's

¹ Intervenors in this proceeding are Itcaina and Arrambide, Robert Cummings, V. V. French, Manson Frye, Nathan French, and Frank Seeley.

grazing unit will be impaired by action taken on his applications, the provision in section 3 of the Taylor Grazing Act that no permittee who has complied with the applicable rules and regulations shall be denied the renewal of a grazing permit if such denial will impair the value of his grazing unit has no effect on the award of grazing privileges to which the applicant is entitled.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Charles H. McChesney has appealed to the Secretary of the Interior from a decision of January 14, 1958, by the Director of the Bureau of Land Management involving the award of grazing privileges and use of the Federal range in Montana (Malta) Grazing District No. 1 under the Taylor Grazing Act (43 U. S. C., 1952 ed., sec. 315 *et seq.*).

Montana Grazing District No. 1 was established on July 11, 1935, by an order of the Secretary of the Interior. Between April 9, 1936, and November 24, 1952, grazing privileges on the Federal range in the district were administered by the South Phillips County Cooperative State Grazing District under a cooperative agreement between the Department of the Interior and the State Grazing District (see *Wade McNeil et al.*, 64 I. D. 423 (1957), in which case Mr. McChesney was an intervenor). Since November 24, 1952, the Federal range involved in this appeal has been administered by the Bureau of Land Management.

In applications dated January 12, 1953, September 29, 1953, and December 20, 1953 (amended on January 12, 1954), the appellant requested grazing privileges on the Federal range within the CK-Dry Fork unit of the Malta district. By decisions of March 27 and November 24, 1953, and March 11, 1954, the range manager awarded Mr. McChesney fewer grazing privileges than the numbers for which he applied. Mr. McChesney appealed from each of the decisions.² The appeals were consolidated for a hearing which was held on September 30, October 1 and 3, 1955, at Malta, Montana, before a hearing examiner.

The issues at the hearing as formulated by the examiner were: (1) whether the appellant owns or controls class 1 base property which would entitle him to grazing privileges in addition to those awarded

² In the application of January 12, 1953, Mr. McChesney requested permission to graze 3,500 cattle and 15 horses for 8 months, 60 percent Federal range use. By decision of March 27, 1953, the range manager allowed the appellant privileges for 2,150 cattle and 15 horses for 8 months, 77.7 percent Federal range use.

In the application of September 29, 1953, the appellant applied for a license for 2,000 cattle on the range from December 1, 1953, to March 1, 1954. The range manager's decision of November 24, 1953, allowed the appellant 2,000 cattle for one month.

In the application of December 20, 1953, the appellant applied for a license to graze 3,036 cattle and 20 horses for 12 months. The application was amended on January 12, 1954, when the appellant requested a license for 3,055 animal units (mixed livestock and various numbers and seasons). The appellant was permitted to graze 1,260 cattle for one month and 2,235 cattle for 7 months, 80 percent Federal range, by the range manager's decision of March 11, 1954.

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by the Bureau; (2) whether the appellant owns or controls class 2 base property which would entitle him to grazing privileges in addition to those awarded by the Bureau; and (3) whether the Bureau is justified in imposing a 4-month base property requirement with respect to the appellant's lands (Transcript of Hearing, September 20, October 1, and October 3, 1955, at Malta, Montana, on the appeal of Charles H. McChesney, pp. 8, 9. Page numbers hereafter refer to this transcript unless otherwise indicated).

At the time of the hearing, the appellant was authorized by the Bureau to use the Federal range in the CK-Dry Fork unit to the extent of 2,208 animal units for an 8-month period (Tr. 6).³ A 4-month base property requirement is recognized in the district so that applicants for grazing privileges must support their livestock which use the range for 4 months of each year from forage resources of their base properties (Tr. 9-10). The Bureau introduced evidence of the carrying capacity of the range in the area based upon the Bureau's range survey, which was part of a general Missouri River Basin survey made in 1953, and upon a 1952 survey by the Fish and Wildlife Service and the Bureau of Land Management of the Fort Peck Game Range within which approximately one-half of the range in the unit is located. (Tr. 16, 23, 38-54, 63.) A dependent property survey made by the Bureau indicating that the appellant's base property had a total commensurability or productivity of 10,291 animal unit months (or 2,573 animal units) was also introduced by the Bureau (Tr. 135-136; Bureau's Exhibit 2).

Mr. McChesney believes that he should be permitted to graze 3,500 animal units on the Federal range in the unit for a period of 9 to 10 months each year, and testified that he has been running about 3,100 head of cattle on and off the range since 1950 when he acquired the ranch (Tr. 91, 100-102). Mr. McChesney testified also that there were no restrictions on the operations of his predecessors in the use of the game range for winter grazing; that they ran a lot of their stock through the entire year and never had to feed it but that since he purchased the ranch, the situation has changed, particularly with regard to the Bureau's practice in making allowance for wildlife grazing within the Fort Peck game range (Tr. 99, 106-107, 120-121). He wants a 2-month base requirement rather than a 4-month requirement in the area and he and a number of his witnesses testified that in the particular area of the unit which he uses the climate is milder than in other parts of Montana because of warm winds (chinook) which frequently melt the snow during the winter and make

³ On this appeal it is asserted that during the past 5 years, the appellant has run approximately 3,100 head of livestock 8 months on the range yearly and additional months by special permit.

winter grazing ideal (Tr. 98-100, 117, 118, 185-195). The appellant and his witnesses disputed the accuracy of the Bureau's range capacity survey figures and the propriety of using the Fort Peck Game Range survey. Testimony and other evidence were submitted for the appellant by an expert range consultant, Mr. Mont H. Saunderson, who, in 1953, had analyzed the commensurability of the appellant's base property and the carrying capacity of the Federal range within the unit. According to his analysis, the carrying capacity of the Federal range and the commensurability of the appellant's base property are much greater than what the Bureau's determinations show (Tr. 200-257).

The intervenors testified that the range which they used with the appellant was overgrazed and in poor condition (Tr. 196-199, 263-284).

In a decision of March 12, 1956, amended April 6, 1956, the hearing examiner concluded that the weight of the credible evidence favored the accuracy of the Government surveys of the carrying capacity of the lands and found that the appellant's qualified base property has a commensurate property rating of 10,291 AUM's and will support no more than 2,573 animal units under a base property requirement of 4 months. The examiner held that the determination of the length of the base property requirement is a matter within the sound discretion of the Bureau and that there was no showing of abuse of this discretionary authority. Although the examiner found that the dependency by use of the appellant's base property, established by its previous owners, was approximately 2,800 animal units, he held that under a base property requirement of 4 months the base would support no more than 2,573 animal units and that commensurability was the factor limiting the total range privileges which could be awarded to the appellant.

The Director affirmed the examiner's decision as to the carrying capacity of the Federal and private lands involved and the 4-month base property requirement. The Director held further that the examiner's determination of the appellant's class 1 privileges was moot because that determination was based on the priority period established by the provisions of the Federal Range Code (43 CFR, 1954 Rev., 161.2 (k) (Supp.)), which provisions no longer govern the award of grazing privileges on the range here involved. A special rule effective June 19, 1956 (43 CFR, 1954 Rev., note fol. 161.2 (k) (iii) (Supp.)), modified the provisions of the range code defining land dependent by use with respect to designated lands within Montana Grazing District No. 1 by changing the priority period from the years 1929-1934 to the 5 years immediately preceding January 1, 1953, and also by changing the provision that base land must have been offered

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in applications filed before June 28, 1938, to be dependent by use on the range covered by the special rule. The Director remanded the case to the range manager for determination of class 1 and class 2 grazing privileges, in accordance with the special rule, with respect to these lands.

On appeal, objection is taken to the examiner's ruling, affirmed by the Director, that the weight of credible evidence favored the accuracy of the Government's surveys as to the carrying capacity of the range and to the acceptance of the 4-month base property requirement. The Department has held that questions involving the determination of the carrying capacity of the range and of base property and determinations as to seasons of use are within the discretion of the Bureau, and where there is no showing of mistake, discrimination, or arbitrariness, the Bureau's determinations will be accepted (see *Fine Sheep Co.*, 58 I. D. 686, 691-693 (1944); *Calder v. Murray et al.*, 59 I. D. 528, 532 (1947)). After a careful review of all of the evidence on these questions, there is no basis for holding that the examiner's and Director's rulings were arbitrary, discriminatory, or erroneous; and even though the evidence for the appellant casts some doubt on the accuracy of the Bureau's determination of the carrying capacity of the game range, the evidence in the record as a whole does not warrant modifying the determination. Moreover, the carrying capacity of the range and the 4-month base property requirement are not inflexible but are subject to change and adjustment under the code, and exceptions to the 4-month base property requirement may be made by the issuance of nonrenewable licenses during periods when conditions of the range justify (43 CFR, 1954 Rev., 161.6 (d), 161.13 (e) (Supp.)). Accordingly, the Director's decision affirming the hearing examiner's decision as to the carrying capacity of the range, the commensurability of the appellant's base property, and the 4-month base property requirement in the district was proper.

The appellant objects also to the ruling by the Director that the question of the class 1 privileges to which the appellant was entitled during the 1953 and 1954 seasons is moot. Inasmuch as the only reason for deciding whether the examiner's determination of these privileges was correct is to establish the extent of the appellant's class 1 privileges for future grazing seasons, and as the regulatory provisions for determining such privileges have changed because of the adoption of the special rule, the appellant's objections cannot be sustained.

With respect to the assertions that the special rule is invalid, most of the matters mentioned on this appeal were considered in the decision in the *McNeil* case (*supra*) in which the Department sustained the validity of the special rule governing awards of grazing privileges on the Federal range here involved. The validity of the special rule is now

the subject of litigation ⁴ pending the outcome of which the Department adheres to the decision in the *McNeil* case. The Director's decision that the determination of the appellant's class 1 privileges under the range code is now moot is, therefore, affirmed.

The appellant's complaint that for the 1958 grazing season he was permitted only 1,595 animal units for 8 months and that this determination was made in accordance with the special rule is not properly to be considered on this appeal because this proceeding is limited to the appeal from decisions involving awards of privileges in 1953 and 1954 and the issue of 1958 grazing privileges is not before the Department. The appellant may, of course, appeal, in accordance with the range code, from any award of privileges under the special rule.

Section 3 of the Taylor Grazing Act (43 U. S. C., 1952 ed., sec. 315b) provides in part that:

* * * Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, * * * *except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan.* Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. * * * [Italics added.]

It is asserted on appeal that \$580,000 in loans is secured by portions of the appellant's ranch and that the statutory provision regarding the renewal of permits when the permittee's unit is pledged as security precludes the Bureau's refusal to renew the appellant's grazing permit as the appellant has complied with the applicable rules and regulations and a refusal to renew his permit will impair the value of his grazing unit. However, there is no showing that Mr. McChesney has been denied the renewal of a *permit* within the meaning of the above-quoted provision of section 3. Since 1953, only *licenses* and not *term permits* have been issued to Mr. McChesney.⁵

As far as the record shows, Mr. McChesney has not applied for the renewal of any permit which may have been issued by the State Grazing District to him or to the Hensens who owned and operated the

⁴ *McNeil v. Seaton*, Civil No. 648-58, in the United States District Court for the District of Columbia.

⁵ Licenses are issued under section 2 of the act (43 U. S. C., 1952 ed., sec. 315a) and not under section 3. Solicitor's opinion M-34766, 59 I. D. 340 (1946); see 43 CFR, 1954 Rev., 161.1 (c) (Supp.); *Alford Roos*, 57 I. D. 8 (1938). In the *Roos* case, the Department held that a grazing license did not bar the adjustment of boundaries of grazing districts even though such action might prevent the renewal of a license to one whose livestock unit was pledged as security for a loan.

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ranch between 1910 and 1950.⁶ Moreover, there is nothing on this appeal showing that the value of the appellant's grazing unit will be impaired by reason of a denial to renew a grazing permit or by other action by the Bureau in this case. An assertion that it is obvious that refusal to renew a grazing permit will impair the value of a grazing unit, portions of which are pledged as security for a bona fide loan, without corroborating evidence, is not such a showing.

When the provision in question is read, as it must be, in conjunction with the other provisions of the act, it is clear that a permittee whose grazing unit is pledged as security has no absolute right to have a permit renewed. A grazing permit is not a guarantee that Federal range for grazing a specified number of livestock will be available over a period of time. Range land which is covered by a permit granting exclusive grazing privileges may be exchanged under section 8 of the act (43 U. S. C., 1952 ed., sec. 315g); it may be classified under section 7 of the act (43 U. S. C., 1952 ed., Supp. V, sec. 315f) for any other use than grazing and disposed of in accordance with such classification under the applicable public land laws; and the establishment of grazing districts on the public domain is authorized by section 1 of the act "pending final disposal" of the public lands (43 U. S. C., 1952 ed., Supp. V, sec. 315).⁷ Consistently with these statutory provisions, the range code provides that a license or permit may be reduced proportionately to the reduction in grazing capacity caused by loss of the Federal range due to appropriation (43 CFR, 1954 Rev., 161.6 (e) (6) (Supp.)). The administration of section 2 of the act (43 U. S. C., 1952 ed., sec. 315a) which requires that the Secretary make provision for the protection and improvement of grazing districts, make rules and regulations to preserve the land from unnecessary injury, and provide for the orderly use, improvement, and development of the range may also limit the grazing privileges of any applicant (see 43 CFR, 1954, Rev., 161.6 (e) (5) (Supra.)).

Accordingly, for the reasons discussed herein, the section 3 provision regarding the renewal of grazing permits of permittees whose grazing units are pledged as security provides no basis for modifying the result of the Director's decision in this case.

⁶ The record indicates that in 1952 the appellant was granted a permit by the South Phillips District to graze 2,400 head of cattle for 8 months and that this use was classified as 1,907 class 1 and 493 temporary. Whether the 1952 award amounted to a permit within the meaning of section 3 is questionable, but in any event the appellant did not apply for a renewal of this permit (see footnote 2).

⁷ The privilege to graze livestock on the public domain which is granted by a grazing permit is withdrawable at any time for any use by the sovereign without payment of compensation (*United States v. Cow et al.*, 190 F. 2d 293 (10th Cir. 1951); see *Oman et al. v. United States*, 179 F. 2d 738 (10th Cir. 1949); *Osborne v. United States*, 145 F. 2d 892 (9th Cir. 1944); and see *M. C. Steele et al. v. Ruby Rector Kirby*, A-25713 (March 6, 1950), in which the Department held that a grazing license or permit is merely a privilege which may be revoked by the Department for the purpose, *inter alia*, of consummating a private exchange affecting the land covered by the license or permit).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

APPEAL OF YOUNGER BROS., INC.

IBCA-148

Decided May 28, 1958

Contracts: Additional Compensation—Contracts: Specifications—Contracts: Changes and Extras—Contracts: Contracting Officer

After the occurrence of a storm, which damaged an excavation for anchors and footing for spillway 30-ton cableway, the contracting officer allowed the contractor an option in performing the necessary repair work between placing concrete to the limits of the excavation or forming to the neat line of the structure, in addition to requiring him to clean out the excavation. The contractor conceded his obligation to remove the materials that had sloughed into the excavation but contended that it could not be required to re-excavate beyond the neat lines or to place concrete fill in this area. Although the specifications required excavation to be made only to the neat lines of the structures, and it was contemplated that forming would be necessary only above ground levels, the repair of storm damage is not generally regarded as extra work, even though it is not contemplated by the specifications, and hence the contractor was not entitled to additional compensation unless it could show that the contracting officer, in allowing it a choice only between two alternatives prevented it from adopting still another method which was reasonably adapted to the requirements of the situation and which would have been less expensive than either of the two methods which were allowed. It is immaterial that the cost of repairing the storm damage was disproportionate, or that the work to be performed under the contract was limited to foundation work.

Contracts: Unforeseeable Causes—Contracts: Performance

Notwithstanding the occurrence of a storm which constituted "unusually severe weather" within the meaning of the delays-damages provision of the contract, and which damaged the excavation work of the contractor, it was not entitled to an extension of time for restoring the excavation when during the period when the restoration could have been accomplished, it could have made no progress due to its failure to have delivered to the job site the main anchor beam and erector anchor bar without which concrete could not have been poured. To be entitled to an extension of time the contractor must show not only that an excusable cause of delay occurred but also that it was a factor in the ultimate delay in the completion of the work. The contractor is entitled, however, to an extension of time for 2 days which were required by the contractor to do the extra concrete and form work necessitated by the storm, notwithstanding shortcomings in the concrete work that had to be remedied, since it would undoubtedly

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have completed all of the concrete work 2 days earlier if the storm had not occurred.

BOARD OF CONTRACT APPEALS

Younger Bros., Inc. has appealed from the findings of fact and decision of the contracting officer dated December 9, 1957, denying its claims for additional compensation in the amount of \$2,488.22 and for additional time for the performance of its contract No. 14-06-200-6327 with the Bureau of Reclamation.

The contract, which was dated April 17, 1957, was on U. S. Standard Form 23 (Revised March 1953), and embodied the General Provisions of U. S. Standard Form 23A (March 1953). It provided for the construction of anchors and footing for spillway 30-ton cableway, at the contract price of \$22,464.45. The principal features of the work were (a) excavating for track cable anchor, tailtower footing, and guy anchors, and (b) constructing reinforced concrete track cable anchor, tailtower footing, and guy anchors.

The contractor received notice to proceed with the work on April 29, 1957. As, under paragraph 16 of the specifications, the contractor was to complete the work within 60 calendar days of receipt of such notice, the completion of the work was due on June 28, 1957. The work was completed and accepted on July 12, 1957. As this entailed a delay in completion of the work of 14 calendar days, and paragraph 17 of the specifications provided for liquidated damages at the rate of \$25 per day for each calendar day's delay in completion, the contracting officer assessed liquidated damages against the contractor in the amount of \$350.

The contractor began work promptly after receipt of notice to proceed, and staked the footings and anchors to the lines and grades indicated on the contract drawings. This involved a total excavation of 415 cubic yards. The excavation was substantially completed by May 17, 1957. On May 18 and 19, 1957, a heavy rainstorm occurred. As recorded at Shasta Dam Weather Station, the total rainfall was 1.83 inches. As a consequence of the rainfall, there occurred a sloughing of the banks of the main anchor excavation.

Under date of May 21, 1957, the contractor addressed a letter to G. D. Atkinson, the Chief of the Shasta Operations Field Branch of the Bureau of Reclamation, in which it purported to confirm instructions given to its Mr. Willbanks at the job site the previous day. These instructions were stated to be that the contractor was to discontinue work on the main anchor until the Bureau had had an opportunity to consider possible structural changes. Under date of May 29, 1957, Atkinson replied to this letter and denied that any such instructions had been given. Thus, he stated:

Your superintendent, Mr. Willbanks, requested a detailed inspection of the excavation on Monday morning, May 20th, due to the fact that the storm of the preceding weekend had caused considerable slough. There was some conjecture as to where the limits of firm material would be after cleanup, and the question was raised as to whether the contract would allow any additional payment for excavation and concrete where the slough had extended beyond the neat lines of the structure. Mr. Willbanks indicated that he desired to discontinue further work on the excavation until it was definitely decided whether additional forming would be required. Since stormy conditions were still in effect, the excavation work could not proceed in any event, and was not an issue.

Atkinson went on to state what would be required of the contractor in connection with the repair of the storm damage as follows:

We requested an interpretation of the specifications of the Contracting Officer and were advised that no allowances could be made for additional excavation required due to the storm and that concrete could be placed to the limits of the excavation or formed to the neat line of the structure, at your option.

Cleanup was undertaken on May 22, as soon as the ground was dry enough to accommodate the excavating equipment. We are pleased to note that nothing has developed which will require any structural changes.

After receiving this letter, the contractor elected to pour portions of the concrete anchors to the over-excavated lines in lieu of forming, presumably because this method of performing the work was the more economical. In a letter dated July 15, 1957, the contractor filed its claim for additional compensation, which it itemized as follows:

Excavation—46½ yards @ \$13.12/yard	=	\$610. 08
Concrete—46½ yards @ 30.73/yard	=	1, 428. 95
Cement—63 barrels @ 7.13/bbl	=	449. 19
		<hr/>
		\$2, 488. 22

The contracting officer rejected this claim on the grounds that under clause 11 of the general provisions of the contract the contractor was made "responsible for all materials delivered and work performed until completion and final acceptance"; that under paragraph 27 of the specifications payment for excavation included "all costs of maintaining the excavation in good order during construction"; that the specifications made provision for payment for concrete and cement only to the extent covered by the drawings and specifications or prescribed by the contracting officer; and that in any event the consequences of abnormal weather could not constitute a changed condition.

Both parties seem to have altered somewhat their respective positions in the course of the presentation of the appeal. The contractor concedes that it was obligated by the terms of the contract to repair the storm damage but contends that it was required by personnel of the Government to do more than this, and now advances the "changes" rather than the "changed conditions" clause of the contract as a basis

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for relief. As for the Government, it now argues that the claim for additional compensation is barred by the contractor's failure to protest within 30 days against the ruling made by the contracting officer's representative in his letter of May 29, as required by paragraph 9 of the general conditions of the specifications. This contention of the Government is, however, clearly untenable. The contracting officer did not invoke the failure to protest but considered the claim on its merits. It is well settled that such action constituted a waiver of the protest requirement.

Both parties take the position that their respective contentions are supported by the decision of the Board in the appeal of *Barnard-Curtiss Company*, 64 I. D. 312 (1957). In that case the contractor was to construct a wasteway to replace an old structure of the same nature. The new wasteway was to be a combination structure of precast concrete pipe with concrete inlet transition and a concrete structure at the outlet end of the pipe. The work to be performed included the making of an opening through an embankment across a creek, and the removal of the old wasteway structure, as well as the deepening of the channel which was to carry the water from the outlet works back to the creek. When the work was nearly completed it was damaged by a severe storm. The contractor contended that, even if by the terms of its contract, which contained provisions similar to those in the present case, it was required to repair the storm damage, it was not required to do work outside the pay or neat lines. The Board held, however, that while the scope of the contractor's obligation was not so narrow that it could not be required to do any work that was outside the pay or neat lines, it was not so wide that the contractor could be required to restore any property of the Government that may have been damaged by the storm. Applying this doctrine to the circumstances of the case, the Board held specifically that the obligation of the contractor could not be enlarged to the point "where the contractor, who was required merely to make an opening through the embankment, would be required to rebuild other portions of it, irrespective of the relationship of this work to the restoration of the area excavated by the contractor or to the completion of other features of the contract work."

The Government concedes that in the present case the specifications required excavation to be made only to the neat lines of the structures, and that it was contemplated that forming would be necessary only above ground levels. Clearly, if the storm had not occurred, the contractor would not have been required to excavate beyond the neat lines, or to provide concrete fill for this additional excavation area. But the repair of storm damage is not generally regarded as extra work even though it is not contemplated by the specifications.¹ While

¹ See *Donovan Construction Co. and James Construction Co., d/b/a Donovan-James Co. v. United States*, U. S. Ct. of Claims, No. 230-53 (April 3, 1957).

the work of restoration required of the contractor may not go beyond the reasonable requirements of the situation, the Government argues that the limitation expressed in the *Barnard-Curtiss* case was not exceeded.

The contractor concedes that its obligation to repair the storm damage extended to "the removal of materials sloughed into the original excavation" but did not require excavation beyond the neat lines, or the placing of concrete fill in this area. It regards these requirements as unreasonable, and seeks to distinguish the *Barnard-Curtiss* case on two grounds. The first of these is that in the present case the cost of repairing the damage, which is alleged to have been \$2,488.22, is far greater in relation to the contract price of \$22,464.00 than it was in the *Barnard-Curtiss* case. But the Board did not consider the cost factor in determining in that case what could reasonably be required of the contractor, and it is obvious that the contractor's obligation to repair damage is in no wise limited by its cost. The second ground on which the contractor seeks to distinguish the *Barnard-Curtiss* case is that in that case the work, apart from excavation, involved the erection of structures, as well as foundations, while in the present case it involved only foundation work. It argues that work "around the foundations" is not logically necessary when the contractor's obligation is limited to foundation work. This argument, too, is obviously fallacious. The foundations were not erected for their own sake but to hold structures, and the fact that the contractor in the present case was not to erect the structures did not excuse him from providing adequate foundations. To discharge this obligation the excavation either had to be restored to its original limits, or some other method devised of remedying the situation. Certainly, the contractor's obligation was not restricted to the removal of the material that had sloughed into the excavation.

The burden of establishing a basis for its claim is on the contractor, and this burden could be met only by showing that the contracting officer, in allowing the contractor a choice only between two alternatives, prevented it from adopting still another method which was reasonably adapted to the requirements of the situation and which would have been less expensive than either of the two methods which were allowed. Conceivably, the contractor, after cleaning out the excavation, could have resloped it but this would have required compacted fill, and it is not possible for the Board on the basis of the record to determine whether such a method would have been more practical or less expensive than the concrete fill. Moreover, the contractor does not even allege that such a method could have been adopted, and that it would have been less expensive. On the contrary, the contractor seems

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to concede in his notice of appeal that either forming to the neat lines or placing concrete to the limits of the excavation was "necessary." The claim must be denied.

As for the contractor's claim for additional time for performance, it requests an extension of time of 14 days, which would relieve it of all the liquidated damages. In a letter to the Bureau dated July 15, 1957, the contractor had requested an extension of time of 13 calendar days, alleging that operations had been shut down from May 20 to May 22 during the investigation of the main anchor excavation following the storm, and that 10 additional days had been required to clean up the excavation, and to pour the additional concrete. However, the contractor apparently increased the 13 to 14 calendar days in its release on contract by reserving a claim for the whole amount of the liquidated damages withheld.

The contracting officer found that the rainstorm of May 18-19, 1957 was "unusually severe weather" within the meaning of clause 5 of the general provisions of the contract.² Nevertheless, he concluded that the contractor was not entitled to any extension of time. Thus, he stated:

Construction records of the Government show that excavation operations for the main anchor were delayed four days due to rainfall, but that in the absence of such delay progress would not have been made because of nondelivery on the jobsite, prior to June 10, 1957, of the main anchor beam and erector anchor bar. Approximately two additional days were required for the extra concrete and the form work performed as a result of the sloughing of excavation during the May 18-19 storm. However, it was not this additional work but, rather, poor organization of concrete placement work and concrete defects requiring extensive repairs which were the controlling causes of delay in completion of the contract work.

The contractor admits that there was delay in the delivery of the main anchor beam and erector anchor bar,³ except that it contends that they were delivered to the jobsite on June 7 rather than June 10, as found by the contracting officer. The contractor also admits that there were defects in the concrete work which had to be remedied. It takes the position, nevertheless, that it should not have been charged with any liquidated damages, and advances two arguments in support of its position.

The first is that after the storm occurred it necessarily had to wait for instructions on how to repair the damage, and that these instruc-

² Clause 5 (c) of the general provisions of the contract provided that the contractor should not be charged with liquidated damages "because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor," including, but not restricted to, certain named causes among which is "unusually severe weather."

³ Under paragraph 18 of the specifications the materials were to be supplied by the contractor.

tions were embodied in Atkinson's letter of May 29, which was not received by the contractor until May 31. The second argument is that despite the delays attributable to the contractor the work would have been completed in time if the rainstorm had not occurred. The contractor points out that its records indicate that the job was ready for pouring cement on June 11, 1957, and that it was accepted on July 12, 1957. There thus elapsed 31 days between the time the job was ready for pouring and its completion, a period that included the delays attributable to it. Before the storm the excavation had been substantially complete and the contractor's superintendent had estimated that he would be ready for pouring by about May 21. Adding 31 days to the period beginning with May 21 would indicate, argues the contractor, that the job would have been completed by June 21, which would have been 7 days prior to the contract completion date.

To be entitled to an extension of time the contractor must show not only that an excusable cause of delay occurred but also that it was a factor in the ultimate delay in the completion of the work. The contractor's argument that it should be allowed an extension of time for the period during which it was waiting for instructions concerning the repair of the storm damage would have force if it were not for the fact that the contracting officer has found that during this whole period the contractor was not in a position to proceed any further with the work. Whether or not the main anchor beam and erector anchor bar were delivered June 7 or June 10, it is clear that the contractor was not in a position to pour cement between the time when the storm occurred and May 31 when it finally received the contracting officer's instructions. Assuming even that the necessary materials were received by the contractor by June 7,⁴ it would have had ample time before this to restore the excavation, for the contracting officer has found that the excavation operations were delayed only 4 days by the storm. Moreover, the contractor hardly needed instructions to know that it had to clean out the sloughed material from the excavation. The contractor's second argument based on the time which it took to complete the job after pouring is no less fallacious. This period of 31 days cannot simply run from May 21, for it is obvious that the contractor was not then ready for pouring, the necessary materials not yet having arrived. Nevertheless, the contractor would seem to be entitled to an extension of time of 2 days, for the contracting officer has found that approximately 2 additional days were required by the contractor to do the extra concrete and form

⁴ The contractor's statement that its own records show that the job was not ready for the pouring of cement until June 11 would seem to cast doubt upon the validity of this assumption. If the materials were received, indeed, on June 7, then there is an unexplained delay of three days in pouring cement. Two of these days were, however, a Saturday and Sunday.

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work which were made necessary by the storm and, notwithstanding the shortcomings of its concrete work, it would undoubtedly have completed all of the concrete work 2 days earlier if the storm had not occurred. The claim for an extension of time of performance is, therefore, allowed to the extent of 2 days.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer are affirmed, except as modified.

WILLIAM SEAGLE, *Member.*

We concur:

THEODORE H. HAAS, *Chairman.*

HERBERT J. SLAUGHTER, *Member.*

UNION OIL COMPANY OF CALIFORNIA RAMON P. COLVERT

A-27532

Decided May 28, 1958

Mining Claims: Determination of Validity

The fact that a mineral locator has filed an application for patent and paid the purchase price does not leave the Secretary of the Interior with only the ministerial function of issuing the patent, but the mining claim is subject to protest and contest to determine its validity.

Mining Claims: Generally

An oil and gas lessee is not in the category of those who can and must file an adverse claim against a mining claim during the period of publication of notice of an application for patent to the mining claim.

Mineral Lands: Multiple Mineral Development

The fact that an application for a mineral patent has been filed for lands included within an oil and gas lease does not prevent the oil and gas lessee from initiating proceedings under section 7 of the Multiple Mineral Development Act.

Mineral Lands: Multiple Mineral Development

Section 7 of the Multiple Mineral Development Act applies to all conflicts between a lessee, applicant, permittee or offeror under the mineral leasing laws and a claimant under the mining laws, including mineral claims based upon minerals now subject to disposition only under the mineral leasing laws.

Mineral Lands: Multiple Mineral Development

Where an oil and gas lessee initiates action under section 7 of the Multiple Mineral Development Act for land covered by an application for a mineral patent, the proceedings will be allowed to continue through publication and the filing of a verified statement by the patent applicant, but then the section 7 proceedings will be stayed until the patent application is disposed of.

Mineral Lands: Multiple Mineral Development

Section 7 of the Multiple Mineral Development Act may be invoked against all unpatented mining claims, whether they are identifiable or not or whether the names and addresses of the locators are known or not.

Mining Claims: Generally—Oil and Gas Leases: Lands Subject to

Where the records of the Department show a tract of land to be free from an adverse claim, an oil and gas lease issued for such land is *prima facie* valid even though it appears thereafter that a mineral location has previously been made on the tract.

Mining Claims: Generally

Where a mineral claimant applies for a patent for land included within a *prima facie* valid oil and gas lease, the mineral entry cannot be allowed until the mineral applicant has established the validity of his claim in a contest brought against the oil and gas lease or at a hearing ordered by the Department at which the mineral claimant will have the burden of proof.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Union Oil Company of California has appealed to the Secretary of the Interior from a decision dated June 28, 1957, of the Acting Director of the Bureau of Land Management which reversed the decision of the manager of the Denver land office denying Ramon P. Colvert's request for a stay of proceedings in connection with Union Oil Company's mineral patent application, Colorado 07667, to permit Colvert to proceed pursuant to section 7 of the Multiple Mineral Development Act (30 U. S. C., 1952 ed., Supp. IV, sec. 527) to determine the rights of mineral claimants to Leasing Act minerals within an oil and gas lease (Colorado 03022) previously issued to him.

On January 6, 1954, Union Oil Company filed an application for a mineral patent for 40 oil shale placer claims, covering 6410.07 acres in sections 21, 22, 23, 24, 25, 26, 27, 34, 35, and 36, T. 4 S., and section 4, T. 5 S., R. 95 W., 6th P. M., Colorado. The oil shale placer locations were made in 1918 and 1919 by various persons whose interests in the claims have been conveyed to Union Oil Company. Publication of the application for mineral patent was completed on May 28, 1954. Colvert's oil and gas lease was issued to him in November 1951 covering all or part of secs. 20, 21, 22, 27 and 28, T. 4 S.,

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R. 95 W., 6th P. M., for a primary term of 5 years. Upon the expiration of the primary term the lessee was granted a 5-year extension effective November 1, 1956. On June 15, 1954, Union filed, with other documents, an application to purchase and paid the purchase price for the claims.

On November 22, 1954, Colvert filed with the Denver land office an affidavit in which he asserted that 10 of the mining claims which conflicted with his lease in secs. 21, 22, and 27, were invalid and that there were defects in the patent application. He requested that further proceedings in the matter of the application for patent be stayed until the procedure specified in section 7 of the Multiple Mineral Development Act (*supra*) had been performed or until a hearing was held in which it might be decided in what manner the conflicting rights of the lessee and the mineral claimant could be presented. With his affidavit, he submitted a copy of a notice he had filed on November 13, 1954, in the office of the Clerk and Recorder of Garfield County, Colorado, in compliance with section 7 (a) of the Multiple Mineral Development Act (*supra*). On January 21, 1955, Union Oil Company filed a motion to dismiss Colvert's request. In a decision dated February 1, 1955, the manager denied Colvert's petition for a stay of the patent proceedings. Thereupon Colvert filed an appeal with the Director of the Bureau of Land Management.

On March 8, 1955, Colvert filed with the Denver land office a request for publication of a notice of his lease in accordance with the provisions of section 7 (a) (*supra*), which the manager forwarded to the Director for consideration.¹

In his decision of June 28, 1957, the Acting Director held that action on Union Oil Company's mineral patent application would be suspended to the extent of its conflict with the Colvert's oil and gas lease and that further action would be taken on Colvert's request for publication in accordance with the pertinent departmental regulations.

Union Oil Company has duly appealed to the Secretary from that decision and has filed a brief in support of its appeal. Colvert has filed a reply brief.

The Acting Director held that under section 7 (a) (*supra*) a lessee of an oil and gas lease could invoke the procedure prescribed therein to determine the rights of mining claimants under unpatented mining claims to leasable minerals on the same land; that the mining claimant and the oil and gas lessee were not seeking the same mineral; and that

¹ The regulations relating to proceedings under section 7 were not issued until August 16, 1955 (43 CFR, 1954 Rev., Part 186 (Supp.)).

an oil and gas lessee is not precluded from proceeding under section 7 for failure to file an adverse claim during the publication period of the patent application, as provided in the mining laws (30 U. S. C., 1952 ed., secs. 29, 30), because an oil and gas lessee is not an adverse party under the mining laws.

In its appeal, Union Oil Company argues, first, that because it had complied with all the requirements of the mining laws and paid the purchase price, equitable title to the land in its claims had passed to it, that all that remained to be done was the ministerial act of issuing the patent, and that no question as to its right to Leasing Act minerals which might be decided under section 7 (a) was left for determination.

In *United States v. Al Sarena Mines, Inc.*, 61 I. D. 280, 283-285 (1954), the Department considered fully a similar contention by an applicant for a mineral patent to whom a final certificate had been issued that, in the absence of an adverse claim during the period of publication, equitable title had passed to it and the Department had no jurisdiction to consider a protest filed after the date of the final certificate. The Department found the contention untenable, holding that the Department can inquire into the validity of rights to public land until the legal title to the land has passed (*Cameron v. United States*, 252 U. S. 450, 460 (1920)), that the issuance of a final certificate did not vest equitable title in the mineral patent applicant, and that until the Department had determined that all the requirements of the law had been met, it could entertain a protest and order adversary proceedings against the validity of the claim. In view of the holding in the *Al Sarena* case, the appellant's contention that all that remained for the Department to do was the ministerial act of issuing the patent cannot be sustained.²

Next the appellant contends that Colvert, not having filed an adverse claim within the time allowed by the statute (30 U. S. C., 1952 ed., secs. 29, 30), is precluded from proceeding under section 7 (a) of the Multiple Mineral Development Act. This contention is, of course, based upon the conclusion that an oil and gas lessee is an adverse claimant within the meaning of the mining laws.

The Department has for many years held that an adverse claim must be filed only by rival mining claimants and that an oil and gas lessee does not fall into that category. In *Joseph E. McClory et al.*, 50 L. D. 623 (1924), an oil and gas permittee filed a protest against a mineral patent application, during the period of publication, which the local

²The case of *Benson Mining and Smelting Co. v. Alta Mining and Smelting Co.*, 145 U. S. 429 (1892), is not to the contrary because it concerned an attack upon a mining claim for which a final certificate had issued based upon events occurring after the issuance of the certificate. Here we are concerned with the question of whether prior to the time the applicant paid the purchase price he had complied with the requirements of the mining law, a determination which may be made at any time prior to issuance of a patent. *United States v. Al Sarena Mines, Inc.* (*supra*) and cases cited therein.

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officers treated as adverse claim. The Commissioner of the General Land Office (now Director of the Bureau of Land Management) held that the protestant was not asserting his claim under the United States mining laws and that therefore his protest could not be treated as an adverse claim under sections 2325 and 2326 of the Revised Statutes (30 U. S. C., 1952 ed., secs. 29 and 30). In approving this action, the First Assistant Secretary said:

The appellants do not contend that it was error to refuse to treat the protest filed as an adverse claim under sections 2325 and 2326 of the Revised Statutes, and the Department finds none in such action. "The parties are not rival mining claimants and to such only the law on the subject of adverse claims applies." Lindley on Mines, Sec. 720; Creede and Cripple Creek Mining and Milling Company v. Uinta Tunnel Mining and Transportation Company (196 U. S., 337, 360). [50 L. D., p. 624.]

This has been the rule which the Department has ever since followed. *H. Leslie Parker et al.*, 54 I. D. 165, 173-174 (1933).³

The manager in his decision held that proceedings under section 7 are not applicable to situations in which both the mineral applicant and the oil and gas lessee are seeking the oil and gas deposits. The Acting Director held that the act made no exception for situations where the unpatented mining claim may be an oil shale placer claim or where both the mineral patent applicant and the mineral lessee are seeking oil deposits and that the manager was in error in denying the request of the oil and gas lessee to proceed under the act.

For the reasons set out below, I believe that the Acting Director's conclusion is the correct one.⁴

Where a mining claim is based upon a nonleasable mineral, the removal of Leasing Act minerals from the claim still leaves the mining claimant in a position to exploit the mineral on which his claim is based. However, where Leasing Act minerals are removed from a claim based on one of them, the heart is removed from the mining claim, and, whatever rights the mining claimant may have left, he can no longer assert any interest in the mineral on which his claim was based.

Despite the serious differences in consequences to the mineral locator, there is nothing in the act which removes from its strictures a mining claim based upon a leasable mineral. The act imposes its

³ The appellant relies on *Bonner v. Meikle*, 82 Fed. 697 (C. C. D. Nev. 1897), and *Young v. Goldsteen*, 97 Fed. 303 (D. Alaska 1899), as establishing a broader rule. However, in *Grand Canyon Railway Co. v. Cameron*, 35 L. D. 495 (1907), the Secretary of the Interior expressly refused to follow them and cited many cases holding to the contrary.

⁴ The Acting Director went on to say that the mineral claimant and the oil and gas lessee were seeking different minerals, the one, oil shale, and the other, oil and gas deposits, and that, as a result, it was not necessary to determine whether section 7 would apply to a situation where the identical mineral is sought by each party. This decision is not to be deemed to lend support to the view that a different rule would apply in the latter situation, for the language of the act applies in the one case as well as in the other.

provisions upon "any mining claimant under any unpatented mining claim," (section 7 (a)), a description which plainly includes a mining claim based upon a leasable mineral.

While the legislative history of S. 3344, 83d Congress, 2d sess., which became the Multiple Mineral Development Act, does not appear to contain any specific consideration of this problem, it is also devoid of any intimation that the act would not apply to all unpatented mining claims. However, the problem was discussed in hearings held before the Subcommittee on Mines and Minerals of the Committee on Interior and Insular Affairs, House of Representatives, 83d Congress, 2d sess., on H. R. 8892 and 8896, which were identical to S. 3344.

While Clair Senior, an attorney appearing in behalf of the American Mining Congress who participated in the drafting of the bills, was explaining the effect of section 7, the following colloquy occurred:

Mr. ASPINALL. Then, Mr. Senior, who can be hurt by this provision?

Mr. SENIOR. The man who can be hurt by this provision is the man who has had a mining claim located in the past and who has not had a sufficient interest or alertness to see to it that he got notice and did something about the notice when he got it.

We have a responsibility, Congressman Aspinall, that we are imposing upon the mining man. But there are a lot of things that happen, we feel, in the matter of adequate administration of the duties that citizenship sometimes imposes upon an individual, a responsibility of action as distinguished from inaction. We are imposing there on the man who has a mining claim, who is not in possession, a responsibility of action, if this notice is published, in making his claim known, or at least the responsibility of action in filing a notice that says, "Mail me a notice at a certain place so I can do something about it."

Mr. DAWSON. Then I take it, even if he does not come in, as you say, and do anything about it, he can still go on years after and develop his mine as long as he did not interfere with that mineral lease or the Mineral Leasing Act?

Mr. SENIOR. That is right, Congressman Dawson. That, of course, we would have to recognize would condemn him to death if he happened to be one of those people who had had that under the patented mining claim hanging fire since prior to the enactment of the Mineral Leasing Act on February 25, 1920, where to cut him out of the oil-shale claim, cut him out of the oil shale, would be to hang him. But incidentally—

Mr. DAWSON. Right at that point, he did not file that mining claim originally to get oil shale anyway, because oil shale is not under the general mining laws.

Mr. SENIOR. It was prior to 1920. He may have filed in 1918. But actually one of the things that is causing the greatest difficulty in that area is this matter of these old, old claims located prior to 1920 which are still on the record without any knowledge as to whether any one claims anything under them or not.

It so happens that frequently you may find that the original locators would not claim something, but the alert speculator who had found their heirs, after somebody had found an oil well, would be there claiming. [Pp. 29-30.]

Later Mr. Senior referred to oil shale claims again as follows:

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Mr. SENIOR. This section 7 that we are talking about would be an advantage to the oil and gas people, and again I remind you that in talking about the oil and gas people, I am talking about the Mineral Leasing Act people because the oil and gas people do not stand apart from the phosphate, potash, coal, oil, or shale people.

They are in the same boat. But it would give them the opportunity for the discovery of contention of valid claims.

May I say that one of the greatest difficulties exists in regard to claims that were located out in the area there many years ago, before the passage of the Mineral Leasing Act—let us say for the oil shale claims—hundreds of thousands of acres.

On the plateaus where there are oil shale exposures, and those claims were located, placer claims could be located by 8 people right in 160 acres, with no limitation on the number of claims those same 8 people could locate.

Nothing has been done, nothing is on the record, since that claim was located in 1917.

In 1920 the Leasing Act was passed that closed the door to the location of claims for oil shale, as it closed the door for the location of claims for oil shale, it also closed the door for the forfeiture of location, because of default in performance of annual assessment labor, and gave an immunity in respect to annual assessment labor or performance.

There will appear on the unit tracts of a given area of some scores of locators—I am assuming an area where you can identify the location with the tract—and those source of locators appear there, persons recruited at the time of location from different points, since all those claims must have antedated 1920, it is obvious that a good proportion of those locators are now deceased, and I am familiar with a case in regard to a unit of some 34,000 acres, where the company undertook to trace down the whereabouts—

Mr. YOUNG. They do not have to do assessment work?

Mr. SENIOR. No.

Mr. YOUNG. What if located prior to 1920?

Mr. SENIOR. The fact the only discovery that could be made on the ground was oil shale meant that after 1920 nobody else could make a location. [P. 49.]

* * * * *

Mr. SENIOR. I am afraid, Congressman, that I was misunderstood in that I said this: That as to any mining claim located prior to the enactment of the Mineral Leasing Act in 1920, where the mining location was based upon the discovery of one of those minerals withdrawn from future location by the Leasing Act, that by reason of the fact that the Leasing Act did preclude subsequent relocation, it precluded adverse relocation, which could create a forfeiture clause of my default in respect to a prior claim.

Mr. REGAN. Do you have any idea how many such claims might be in existence?

Mr. SENIOR. How many?

Mr. REGAN. Yes. Are there any great number of such claims?

Mr. SENIOR. There are thousands.

Mr. REGAN. There is nothing in the Congress, there is nothing that the Congress can do, then, to clean those up?

Mr. SENIOR. This, we think, is something that Congress can do to help in that direction.

Mr. REGAN. You think this bill will help to do that?

Mr. SENIOR. Yes. [P. 51.]

In commenting on S. 3344 and H. R. 8896 the Assistant Secretary of the Interior said:

Section 7 authorizes publication of notice of any Leasing Act permit, lease, or application or offer for such permit or lease. The mining claimant may file a claim to minerals subject to the mineral leasing laws by reason of his mining location. If he does not file his claim within 150 days after the date of first publication of the notice, any claim or right to these minerals by the locator will be deemed to be relinquished. If a claim is asserted, this Department would hold hearings to determine the right of the claimant to the minerals. This provision would delay somewhat the issuance of mineral leases and permits, but would furnish the mineral lessee or permittee with some security of title with respect to outstanding claims to the land he wishes to explore or develop. The publication provisions are comparable to those applicable to contests of applications for mineral patents under the mining laws.⁵

These comments are consistent with the plain language of the act and fully support the conclusion that section 7 applies to all unpatented mining claims, whether based on a locatable mineral or a Leasing Act mineral.

The appellant has also adverted to the proposition that section 7 was intended to deal only with unidentifiable mining claims. Although the possible existence of such mining claims was a major reason for the passage of the legislation, there is nothing in the act which restricts section 7 only to claims of that type. It is clear that section 7 may be used even where the leasing act applicant has found persons working upon the mining claim or has discovered the names and addresses of the locators (section 7 (a)).

Having determined that the completion of the preliminary steps to the granting of a patent, even through the issuance of a final certificate, does not prevent the Department or others from attacking the validity of the mining claim and that an oil and gas lessee is not precluded from asserting his rights for failure to file timely an adverse claim, we may now consider the interrelation of the two procedures under which the parties are seeking to proceed.

As a mining claimant alleging a prior valid location the appellant has the right to proceed under the mining laws and regulations to obtain a patent despite the fact that an oil and gas lease has been issued for land covered by its claim. *Marion F. Jensen et al., Elden F. Keith et al.*, 63 I. D. 71 (1956). However, the possible existence of mining claims on land for which no application for patent has been

⁵ Letter dated May 19, 1954, from Assistant Secretary Orme Lewis to Hon. A. L. Miller, Chairman, Committee on Interior and Insular Affairs, House of Representatives, printed at p. 12 of Hearings on H. R. 8892 and 8896, *supra*; letter dated May 14, 1954, from Assistant Secretary Orme Lewis to Hon. Hugh Butler, Chairman, Committee on Interior and Insular Affairs, United States Senate (Hearings before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, United States Senate, 83d Congress, 2d sess., on S. 3344, pp. 7-8).

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filed does not prevent the Department from issuing an oil and gas lease because, as the Department has held:

* * * The mining claimants had not applied for a patent to their claim, and at the time of the issuance of the lease, the tract books of the General Land Office [now Bureau of Land Management] showed the land to be free from adverse claim and to be subject to lease. The issuance of the lease was therefore regular and the lease is prima facie valid. * * * *Ohio Oil Company et al. v. W. F. Kissinger et al.*, 58 I. D. 753, 758 (1944).

See also *Orem Development Company v. Leo Calder et al.*, A-26604 (December 18, 1953).

It is well established that a mineral entry cannot be allowed for land within an existing entry so long as the latter remains of record. *Roos v. Altman et al.* (On Petition), 54 I. D. 47, 56-57 (1932). This rule is based upon the concept that an entry of land under the public land laws segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the entry is officially canceled. An oil and gas lease is deemed to be such an entry. *Lula T. Pressey*, 60 I. D. 101 (1947). It has been said that to allow two entries, antagonistic as to the exclusive right to the possession of the surface, to exist for the same land is in contravention of a fundamental rule of the Department that two entries for the same tract must not exist at the same time. *Roos v. Altman* (*supra*, p. 49). While an oil and gas lessee does not have the exclusive right to the possession of the surface, a valid mineral locator does, so that the existence of an oil and gas lease is inconsistent with the existence of a mineral entry for the same land. *H. Leslie Parker et al.* (*supra*, at 173 (1933)).

Where a mineral applicant seeks a patent for land covered by an existing entry which is prima facie valid, the conflicting entry must be removed before the mineral patent can be processed. *Walter G. Bryant*, 53 I. D. 379 (1931). When faced with a conflict of this nature, the Department has directed the mineral claimant to bring a contest against the existing entry or has ordered a hearing at which the mineral claimant has the burden of showing the validity of his claim. *Walter G. Bryant* (*supra*); *Clarence H. Steussy*, 58 I. D. 474, 478-479 (1943); *H. Leslie Parker et al.* (*supra*); cf. *Augusta G. Stanley, State of California*, A-26959 (November 15, 1954); *Monolith Portland Cement Company et al.*, 61 I. D. 43, 44, 49 (1952).

If this latter principle were being considered on first impression, it might be seriously doubted whether the locator of a prior mining claim properly should be required to carry this latter burden against a subsequent lease applicant. But the decisions cited above are firmly implanted in the public land precedents of this Department. In a

case involving the same sequence of events appearing in this appeal, the Secretary stated:

There is no merit in the contention of the appellants that the failure of the permittee to adverse the patent application during the period of publication thereof, forecloses any assertion of right under the permit. The permit was granted before the application for patent was filed. It was the duty of the patent applicants to contest the permit and first show that they had a superior right under the mining locations. Appendix to Oil and Gas Regulations, Circular 672 (47 L. D. 463, 470). Under the long established policy of the Department to treat as excluded from entry or filing lands to which the claims of others have been allowed, these appellants by their application acquired no legal status other than that of a contestant. *State of Utah, Pleasant Valley Coal Company Intervener, v. Braffet* (49 L. D. 212); *Work v. Braffet* (276 U. S. 560). The mineral application should, therefore, never have been permitted to proceed to publication, and no adjudication in this proceeding solely between the Government and the mineral claimant that the mineral claims were valid, had the evidence so warranted, would have been binding upon the permittee or his privies in interest, to the extent they are not actually parties to the proceeding. Furthermore, an oil and gas prospecting permit is not granted under the general mining laws, and the rule, that a mineral claimant's failure to adverse an application for patent to a mining claim results in the conclusive presumption that no such claim exists, has no application. (*H. Leslie Parker et al., supra*, at 173.)

This practice does have virtue of bringing together all parties interested in the land and all the issues which might otherwise have to be resolved piecemeal. In this case it would relieve Union Oil Company from defending its claim in a section 7 proceeding and then, if successful, facing another possible contest initiated by the Government. It adds no burden to Union Oil Company because it cannot proceed with its mineral patent until the outstanding oil and gas lease is disposed of. Accordingly before a patent can be issued to Union Oil Company, it must bring a contest against Colvert's oil and gas lease.

There still remains for consideration Colvert's request for publication pursuant to section 7. Section 7 provides:

Any applicant, offeror, permittee, or lessee under the mineral leasing laws may file in the office of the Secretary of the Interior, or in such office as the Secretary may designate, a request for publication of notice of such application, offer, permit, or lease * * *. (30 U. S. C., 1952 ed., Supp. IV, sec. 527.)

Section 7 is part of the Multiple Mineral Development Act which was enacted, insofar as is material here, to provide a mechanism for determining the rights of mining claimants under unpatented mining claims to leasable minerals in the same lands. The statute requires the applicant, lessee, etc., to take certain steps culminating in publication of a notice of the application, lease, etc., and mailing a copy of the notice to certain persons who might be claimants under an un-

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patented mining claim for the same lands. Thereupon the mining claimant must file a verified statement within a prescribed time or, in effect, have the Leasing Act minerals removed from his claim. If he files a verified statement, then a hearing is held to determine the validity and effectiveness of the mining claimant's asserted rights in Leasing Act minerals. "Leasing Act minerals" are defined as all minerals which upon the effective date of the Multiple Mineral Development Act (August 13, 1954) are provided in the mineral leasing laws to be disposed of thereunder (30 U. S. C., 1952 ed., Supp. IV, sec. 530). Both oil shale deposits and oil and gas deposits fall within this definition. (30 U. S. C., 1952 ed., sec. 181.)

The situation presented by this appeal seems to be typical of the problem which section 7 was designed to alleviate. For the reasons earlier stated, Colvert, as a lessee under the mineral leasing laws, is qualified to initiate proceedings and Union Oil Company as a claimant under an unpatented mining claim must respond or suffer the consequences. However, the right of Colvert to proceed under section 7 must be accommodated to the right of Union Oil Company to carry its patent application to a conclusion. To allow both parties to move ahead independently with the application each has initiated could result in two separate hearings in which the issues would be essentially the same. I believe it is unnecessary to put the parties to such a burden.

On the other hand, if Colvert is not allowed, at least, to proceed to publication of his notice, he will be prevented from clearing his lease of the claims of other mining claimants, if such there be, to the Leasing Act minerals in the land covered by his lease and be subject to the possibility that Union Oil Company might withdraw its patent application at some future time.

There is a procedure which, I believe, will prevent duplication and protect each party. Union Oil Company will be directed to file a contest against Colvert's oil and gas lease (an obligation which it must in any event assume) within 30 days from the receipt of this decision or suffer the rejection of its application for patent. Colvert will be allowed to proceed under section 7 and Union Oil Company will be required to file a verified statement within the time allowed. Since Union Oil Company has already filed a patent application, the filing of a verified statement will impose no material burden on it. However, no hearing will be held under section 7 until the patent proceeding is disposed of. If the latter results in a finding favorable to Union Oil Company, the oil and gas lease will of necessity be canceled and there will be no need for further proceedings under section 7. If the result is unfavorable to Union Oil Company, its mining claim will be held

null and void and the issue Colvert seeks to raise under section 7 will have been settled.^a

In the meantime Colvert will have been able to obtain the advantages of section 7 as to other possible mineral claimants.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director is affirmed insofar as it permits Colvert to proceed to publication under section 7 and the case is remanded for further proceedings consistent herewith.

ELMER F. BENNETT,
Solicitor.

^aThis in essence is the procedure provided for by the Bureau of Land Management Manual, which in discussing applications under section 7, provides:

"If the mining claimant files a verified statement as required by section 186.12 the Hearing Examiner shall fix a time and place for a hearing to determine the mineral locator's right or interest in the leasable minerals, in accordance with Subpart C, Part 221. The hearing shall be in the county where the lands lie unless the mining claimant agrees to have the hearing in a different place.

"A. If the mineral locator has filed a mineral patent application, the Manager will suspend action on the verified statement until it is determined whether the applicant is entitled to a patent." (Vol. VI, part 3, ch. 3.5.14.)

HUMBLE OIL AND REFINING COMPANY

A-27568

Decided May 29, 1958

Administrative Practice—Bureau of Land Management—Rules of Practice: Generally

It is proper for the Eastern States Office of the Bureau of Land Management, on its own motion, to reconsider its decisions prior to an appeal to the Director, even though there are adverse rights present.

Oil and Gas Leases: Applications

Where a lease is offered to an applicant subject to a restricted drilling provision, whether the applicant will be able to operate the lease in accordance with the restriction is a matter pertaining to performance of lease obligations and not to his qualifications as an applicant for the lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Humble Oil and Refining Company has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated August 23, 1957, which affirmed a decision of the Chief, Minerals Adjudication Section, Eastern States Office, dated November 29, 1955, rejecting its noncompetitive oil and gas lease offer (BLM 039939) for the reason that the land applied for was included in a prior offer for which a lease had been issued.

The facts of the case, which are undisputed, are that N. C. McGowen, Jr., filed an offer (BLM 037975) for a noncompetitive lease on all of sec. 32, T. 15 S., R. 10 W., Louisiana Meridian, on August 4, 1954. In his offer the applicant stated that section 32 was reserved for light-house purposes by Executive order dated November 22, 1875, and was being administered by the United States Coast Guard. With his offer McGowen included a stipulation whereby he agreed to waive all surface rights to the land applied for and all rights to either direct or directional drilling thereon and agreed to limit his development to the inclusion of the tract in a unitization or pooling agreement subject to approval by the United States Geological Survey.

Inasmuch as the land applied for was being administered by the United States Coast Guard, the Eastern States Office contacted that agency on December 15, 1954, and requested its views in regard to the application, in light of the stipulation attached to the lease offer.

On March 4, 1955, the Coast Guard replied to the inquiry, stating that it had no objection to issuance of the lease subject to the stipulation. The Coast Guard suggested, in addition, that any language in the lease giving the lessee the right to drill should be deleted.

On April 11, 1955, Humble filed its application to lease the same land.

On June 28, 1955, the Supervisor, Eastern States Office, requested an opinion of the Geological Survey as to whether or not the land applied for by McGowen and also by Humble was logically subject to

development under a unit or cooperative agreement and whether such an agreement was necessary or advisable in the public interest and for the purpose of properly conserving natural resources.

In a memorandum dated July 22, 1955, the Director of the Geological Survey replied that the conditions imposed by the Coast Guard would nullify the purpose of leasing and that, unless the Coast Guard changed its position, McGowen's application should be rejected. The Director further stated:

The case record does not disclose any specific justification for not allowing directional drilling except that it would be opposed to long established Coast Guard policy; accordingly, it is recommended that the Coast Guard be requested to reexamine the matter with a possible view to modifying its present stand.

A modification to permit directional drilling with the understanding that no bore hole shall underlie the land within 500 feet of the surface should afford adequate protection to any surface user and would enable the land to be offered for lease if and when development in the area occurs and the land is subjected to drainage.

On August 11, 1955, the Eastern States Office rejected McGowen's application on the ground that the conditions imposed by the Coast Guard and agreed to by the applicant would nullify the purposes of mineral leasing and that this opinion was expressed by the Geological Survey in its report dated July 22, 1955. A right of appeal to the Director was allowed for 30 days from receipt of notice of the decision. The record shows that notice of the decision was served on McGowen on August 13, 1955.

On September 9, 1955, McGowen filed a letter in the Eastern States Office entitled "Request For Reconsideration of the Decision of August 11, 1955." In the letter McGowen referred to the statements in the report of the Director of the Geological Survey which are quoted above and stated that the case records failed to disclose that the Bureau had complied with the recommendation "that the Coast Guard be requested to reexamine the matter with a possible view to modifying its present stand." McGowen further stated that he believed that if the Bureau had followed the recommendation of the Survey the Coast Guard would have vacated its original position and permitted directional drilling. McGowen then requested that the decision of August 11, 1955, be reconsidered and held in abeyance, and that the Coast Guard be requested to report on the recommendation contained in the Survey's report of July 22, 1955.

On September 15, 1955, the Eastern States Office did request the Coast Guard for a report on the Survey's recommendation, and on September 26, 1955, received an answer to the effect that the Coast Guard was agreeable to allowing directional drilling subject to the proviso set forth in the Survey's report of July 22, 1955.

On October 21, 1955, the acting manager of the Eastern States Office revoked the decision of August 11, 1955, and stated that a lease would

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issue upon execution of a stipulation that development of the leased area be limited to directional drilling from surface locations outside the leased area, with the understanding that no portion of the bore hole should underlie the leased area within 500 feet of the surface.

The stipulation was executed and a lease was issued to McGowen, effective as of December 1, 1955.

On November 29, 1955, the Eastern States Office rejected Humble's application because the land included in the application was embraced in an oil and gas lease which was issued on a prior filed application. On Humble's appeal to the Director, the rejection was affirmed, whereupon Humble took this appeal to the Secretary.

Humble has advanced several contentions in support of its appeal. However, they skirt around what appears to be the basic issue in this case. After McGowen and Humble filed their respective offers for the tract in question, the Eastern States Office rejected McGowen's application subject to his right to appeal within 30 days. Within the 30 days McGowen asked for reconsideration of the decision. The Eastern States Office reconsidered, revoked its prior decision, and accepted McGowen's offer subject to his executing a stipulation. After issuance of McGowen's lease, the Eastern States Office rejected Humble's offer and Humble appealed.

These facts show that the basic issue in the case is whether, *in the absence of an appeal*, the manager of a land office has authority to reconsider and modify or revoke a prior decision rendered by him. Humble does not say flatly that the manager does not have such authority, nor does Humble cite any cases indicating lack of such authority. On the contrary, the Department has held time and again that the Director of the Bureau of Land Management, and his predecessor, the Commissioner of the General Land Office, has authority, *before an appeal is taken to the Secretary*, to reconsider a previous decision, on his own motion, and correct any errors that may have been made in his former decision. *L. D. Crawford et al.*, 61 I. D. 407, 409 (1954), and cases cited therein. The same authority inheres in a manager with respect to his own decisions. As the Department said in *United States v. State of New Mexico*, 48 L. D. 560 (1922): "This power of correction, on one's own motion, of one's own errors, before consideration of them by a tribunal of review has superseded the jurisdiction, inheres in every tribunal or adjudicating official, and it aids in arriving at a correct result of a controversy * * *" (p. 562).

Humble argues that a manager cannot reconsider his previous decision where adverse rights are involved. It cites in support *L. D. Crawford et al.*, *supra*. That case, however, was concerned with the authority of the Director to reconsider a decision *after an appeal to the Secretary had been filed*. It held that although the Director had been given limited authority to reconsider previous decisions

even after an appeal was filed, such authority did not extend to cases where there were adverse parties. It did not hold that *in the absence of an appeal* the Director lacked authority to correct a prior decision where there were adverse parties in the case. The decision clearly indicated that jurisdiction is lost only where an appeal is taken and not until an appeal is taken. The presence of adverse parties has nothing to do with jurisdiction.

Humble argues that there was no error in the first decision of the Eastern States Office to be corrected. The answer is, briefly, that there was an error of judgment, in rejecting McGowen's application without further seeking the views of the Coast Guard as recommended by the Geological Survey. The error to be corrected need not be a mistake of law.

It being established that the Eastern States Office had authority, on its own motion, to reconsider its first decision on McGowen's offer, it is unnecessary to discuss Humble's contentions that McGowen had no right to ask for reconsideration of that decision but only a right to appeal and that, not having appealed, McGowen lost whatever rights he had under his offer.

There remains to be considered only Humble's assertion that the Acting Director's decision did not properly consider the question of the qualifications of McGowen to hold a lease of the land involved in light of the stipulation required to be agreed to by him that development be limited to slant drilling from surface locations outside the leased area. Humble's contention is that the ability of McGowen to comply with this provision of the lease goes to the qualifications of the applicant for the lease. Humble states that section 32, the land embraced in the lease, is surrounded by privately owned lands, all of which are under lease by Humble, thereby implying that McGowen will be unable to slant drill from the adjoining land.

The appellant presented this same argument to the Director, who answered it as follows:

A qualified offeror is one who is otherwise qualified to hold leases under the Mineral Leasing Act, as amended, and who files a proper application for land available for leasing. McGowen was in this respect a qualified applicant and his qualifications under the act were not affected by the stipulation required by the Coast Guard. He agreed to this stipulation and a lease issued to him. It was therefore proper to reject Humble's application.

The appellant has not pointed out any error in the Acting Director's holding and the holding is proper under the provisions of the Mineral Leasing Act and the Department's regulations. The fact that Humble leases all of the private lands surrounding the land involved may make it difficult for McGowen to comply with the provisions of the lease, but this fact goes to the performance of the lease obligations and is not a proper basis for denying McGowen the statutory preference right granted to him as the first qualified applicant.

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It thus appears that the appellant has failed to prove any error in the Bureau's decision which would warrant the cancellation of the lease to McGowen and issuance of a lease to it.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

APPEAL OF PETROLEUM OWNERSHIP MAP COMPANY

IBCA-110

Decided May 29, 1958

Contracts: Interpretation

Under the terms of a supply contract for the improvement of the public land records of the United States in the State of Utah for a lump-sum price which involved the processing of estimated quantities of aperture and cross-reference cards and irregular township plats, but provided that the estimated quantities were subject to a 25-percent increase or decrease, the contractor is entitled to additional compensation only to the extent that the estimated quantities, plus 25 percent, have been exceeded. Such a contract is not ambiguous nor lacking in mutuality, nor can it be said to have been prematurely made because the Government may not have been in a good position to estimate the quantities at the time the contract was made.

Contracts: Breach

An allegation by a contractor who was awarded a contract for the improvement of the public land records of the United States in the State of Utah that before its bid is accepted, the Government possessed sufficient information to infer that the estimated quantities of work were erroneous might form the basis of an action for rescission of the contract or for damage for breach of contract, but not for relief by the Board.

BOARD OF CONTRACT APPEALS

This disposes of an appeal of the Petroleum Ownership Map Company, Box 404, Casper, Wyoming,¹ from the finding of fact and decision of the contracting officer dated April 11, 1957, denying a claim consisting of two items aggregating the total amount of \$21,832.03, under Contract No. 14-11-006-8 with the Bureau of Land Management.²

The contract was executed on September 28, 1956, on U. S. Standard Form 33 for supply contracts (revised June 1955) which incorporated the General Provisions of U. S. Standard Form 32 (Nov. 1949 edition). The contract was part of the Bureau's record improvement program. The Bureau had already let a contract to the York Tabulating Service, Inc., for an index of the documents controlling the

¹ Hereinafter designated as "POMCO" or the contractor.

² Hereinafter designated as the Bureau.

ownership and use status of the public lands and resources of the United States. This control document-index was to be composed of tabulating cards which were to be punched, verified, interpreted, sorted and arranged by the contractors.³

The contract with POMCO required it to make use of the control document-index to prepare new land records for the public domain lands of the United States and their resources within the State of Utah for the lump-sum price of \$181,636.50. These land records were to include a master title plat for each township; one or more use status plats for each township; an historical index for each township, which was to be in the form of a narrative summary of all actions affecting the public lands; and, finally, copies of the master title plat and the historical index for each township.

In paragraph 1 of the section of the specifications headed "Detail Information and Description," it was stated: "There are an estimated sixty-five thousand (65,000) mounted aperture and cross-reference cards for the State of Utah * * *." In paragraph 2 of the Specifications, it was indicated that the number of irregular townships which could not be platted on standard diagram sheets amounted to an estimated 85 percent of the total number of townships, which was in turn estimated at 2,550.⁴ However, paragraph 11 of the General Requirements and Conditions of the specifications provided: "All estimated quantities in this contract are subject to a twenty-five per centum (25%) increase or decrease."

Notice to proceed with the work under the contract was received on October 10, 1956, and paragraph 1 of the General Requirements and Conditions of the specifications fixed the date for completion of all the work at June 30, 1957. This date was subsequently extended to March 15, 1958, by Change Orders Nos. 2, 3 and 4.

In all five change orders were entered; they provided either for extra work or extensions of time, or both. The most important of these change orders was No. 2, which was occasioned by the fact that it was found that the control document-index comprised 105,000 aperture and cross-reference cards instead of the 65,000 estimated, plus 25 percent, and that the number of irregular townships were 1,148, instead of the 383 estimated plus 25 percent. Change Order No. 2 provided for additional compensation to POMCO in the amount of \$28,413.33 by reason of the increased work resulting from the Bureau's underestimate of the aperture and cross-reference cards (Item 1) and in the amount of \$16,670.14 by reason of the increased work resulting from the Bureau's underestimate of the number of the irregular townships (Item 2). Under date of March 5, 1957, POMCO accepted Change Order No. 2, except that it reserved claims in the amount of

³ For further details concerning this contract see *York Tabulating Service, Inc.*, 65 I. D. 120 (March 7, 1958).

⁴ See introductory paragraph to the section of the specifications headed "Detail Information and Description."

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\$19,440.17 under Item 1, and \$2,391.86 under Item 2, or in a total amount of \$21,832.03. These claims were based on the contractor's theory that it was entitled to be paid for all work exceeding the estimates.

The issue in this appeal is whether the contractor is to be paid for the full amount of the increases over the estimated quantities of aperture and cross-reference cards and irregular townships rather than merely for the additional quantities above 25 percent.

Counsel for the contractor originally requested an opportunity to present evidence at a hearing in support of its case but he has since withdrawn his request and indicated that he wishes the appeal to be disposed of on the written record.⁵

The contractor contends that on September 18, 1956, which was five days prior to the opening of bids, the York Tabulating Service, Inc., had billed the Bureau for 64,604 cards; that this was within 396 cards of the estimated 65,000 cards in the POMCO contract; that on the day of the award, York billed the Bureau for an additional 16,244 cards, which brought the number of cards under the contract to 80,818 cards, or 16,244 more than the original estimate; and that subsequently the Bureau was billed by York for several thousand more cards. The contractor contends, in other words, that before its bid was accepted, the Government possessed sufficient information to infer that the estimate was erroneous.

The Government admits that there was substantial error in its estimated figures, but denies that these errors were knowingly made or that any information in its possession was withheld or concealed from any bidder.

It is well settled that it is incumbent upon a contractor who advances a claim against the Government that was denied by a finding of fact or decision by a contracting officer to come forward with the evidence showing error therein, and that the contractor has the burden of presenting evidence to show that the action taken by the contracting officer was erroneous. Such burden is not met by mere allegations of what the contractor asserts to be the facts, because such allegation, if disputed by the Government, cannot be accepted as proof that the facts so asserted are true.⁶

Even assuming, *arguendo*, that the facts are as contended by the contractor, they might justify an action for rescission of the contract, or for damages for breach of contract. It is well settled, however, that an administrative agency lacks the authority to grant such relief. The judicial decisions cited by the counsel for the contractor

⁵ In the course of arriving at this position, counsel on both sides became involved in extraneous issues but, since their statements in this connection have become immaterial, they will not be considered by the Board.

⁶ Appeal of *Duncan Construction Co.*, 65 I. D. 135 (1958).

involve actions for breach of contract, for which relief is afforded only by the courts.

The contractor maintains also that paragraph 11 of the General Requirements and Conditions of the specifications is ambiguous, and, therefore, should be disregarded, and that under the "peculiar circumstances" surrounding this contract, it should be treated as of no effect. In these circumstances, the contractor seems to include the "premature" award of the contract.

Reading the contract as a whole, the intent of paragraph 11 is clear. Instead of leaving for future interpretation what would constitute a reasonable variation in the estimated quantities, it fixes specifically the variations which would authorize changes in the contract price. An ambiguity could be found in the provision perhaps if the contract provided for the performance of the various items of work at unit prices. However, the present contract required performance of all the work at a lump-sum price. There was no need, therefore, to provide specifically in paragraph 11 that additional payment would not be made unless the estimated quantities, plus 25 percent, were exceeded. As there is no ambiguity in the contractual provision, no recourse may be made to extraneous circumstances or conversations in the interpretation thereof.

The Board is also unable to perceive how a contract could be said to be "prematurely" awarded. The Government may choose any time to award a contract.

The contractor finally contends that paragraph 11 should be disregarded because it lacks mutuality. This contention is also without merit. As a technical doctrine in the law of contracts, the requirement of mutuality simply imposes an obligation on each contracting party to do, or permit to be done, something in consideration of the act or promise of the other. Speaking generally, the contract was characterized by mutuality, since the contractor stood to gain by underruns, as well as to lose by overruns, in the estimated quantities.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer, dated April 11, 1957, are affirmed.

THEODORE H. HAAS, *Chairman*.

We concur:

WILLIAM SEAGLE, *Member*.

ARTHUR O. ALLEN, *Alternate Member*.

STATE OF WISCONSIN, ROBERT F. HAYES
RICHARD A. NEBEL

A-27542

*Decided June 17, 1958***Public Sales: Generally—Small Tract Act: Sales**

Where land has been classified as suitable for disposition by direct sale under the Small Tract Act, the sale has been held, the purchasers declared, cash certificates issued, and the purchasers have complied with all the requirements of the statute and regulation, a protest against the sale on the ground that the land was improperly classified will be entertained.

Small Tract Act: Sales

The Secretary of the Interior retains jurisdiction to inquire into the validity of the disposal of a small tract so long as legal title remains in the United States.

Small Tract Act: Sales

The Secretary of the Interior may vacate the disposal of a small tract and refuse to issue patent only after proper notice and hearing.

Small Tract Act: Sales

A duly authorized State agency may protest a sale of lands under the Small Tract Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Wisconsin, through its Conservation Department, has appealed to the Secretary of the Interior from a decision dated July 24, 1957, of the Director of the Bureau of Land Management which denied its protest against the completion of a public sale conducted pursuant to the provisions of the Small Tract Act, as amended (43 U. S. C., 1952 ed., Supp. IV, sec. 682a *et seq.*).

The land offered for sale consists of two small islands located 26 miles north of Sturgeon Bay, Wisconsin, in Green Bay, described as lots 1 and 2, sec. 30, T. 32 N., R. 28 E., 4th P. M., Wisconsin, and comprising 1.31 and .63 acres, respectively, in area. The islands, having been omitted from the original survey of the township, were surveyed as public lands and the plat of survey was approved April 21, 1953.

On January 19, 1956, the Supervisor, Eastern States land office, Bureau of Land Management, issued a notice which stated that the plat of survey of the two islands would be officially filed in the Eastern States land office effective as of 10 a. m. on February 23, 1956, and that the islands were classified as suitable for direct sale at public auction pursuant to the provisions of the Small Tract Act.

On February 24, 1956, the acting manager, Eastern States land office, issued an announcement which offered the islands and eleven other tracts for public sale on March 29, 1956, at the Oneida County Courthouse, Rhinelander, Wisconsin. At the sale, which was duly held, R. F. Hayes was the high bidder for Lot No. 1 and Richard A. Nebel

for Lot No. 2. In a decision dated April 2, 1956, they were declared to be the purchasers of the respective tracts. Thereafter Hayes and Nebel each submitted a statement saying that he had not exercised his rights under the Small Tract Act and that he was a citizen of the United States. On April 25, 1956, a cash certificate was executed for each tract and on April 30, 1956, the certificates were approved for patent.

Meanwhile on April 25, 1956, the acting manager, Eastern States land office received a telegram dated April 24, 1956, from the Conservation Director, Conservation Department, State of Wisconsin, asking whether the sale of the islands was final and saying that the Department was very interested in continued public ownership.¹ After some further correspondence, the acting manager, in a letter dated May 3, 1956, in effect, informed the Conservation Director that it was too late to consider another disposition of the islands. Thereafter, in a letter addressed to the Director, Bureau of Land Management, and received on May 31, 1956, the State of Wisconsin through its Conservation Department made a formal protest against the issuance of patents for the islands to private persons. The protest was treated as an appeal. On June 5, 1956, the Eastern States land office informed the purchasers that, in view of the protest, "it is necessary to suspend action on Tracts 12 and 13 [the islands]."

In his decision of July 24, 1957, the Director held that since equitable title had passed to the purchasers there was no further discretion as to the reclassification of the land and that, as a result, the protest must be denied.

In its appeal to the Secretary, the Conservation Department refers to the persistency with which it has protested against the sale and states that the islands are used extensively for the nesting of gulls, terns, and other water birds and should be kept as a refuge, a view which is supported by a statement from the Bureau of Sport Fisheries and Wildlife of this Department. It also asserts that structural developments on the islands will be detrimental from a scenic standpoint to a State park and resort area on the mainland.

If it is assumed that the State's contention that the islands ought to be retained in public ownership is correct, the issue is whether at this stage of the proceedings the Secretary has the authority to set the sales aside and, if he has the authority, whether he ought to exercise it.

The Director, relying upon a series of departmental decisions relating to public sales of isolated or disconnected tracts or tracts too rough or mountainous for cultivation under section 2455 of the

¹On February 27, 1956, the State of Wisconsin, through the Commissioners of the Public Lands, filed an application for the islands under the provisions of the Swamp Land Act of 1850 (43 U. S. C., 1952 ed., sec. 982 *et seq.*). In a decision dated March 5, 1956, the acting manager rejected the application. The State did not file an appeal from this decision and the case was closed.

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Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 1171; 43 CFR, Part 250); held that after a cash certificate has been issued, the Department no longer has discretion as to the reclassification of the land offered for sale. However, the isolated tract sales regulations state that:

* * * However, until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States. [43 CFR 250.5.]

The cases cited by the Director involved situations in which a public sale had been set aside prior to the issuance of a cash certificate. Whether a public sale under that statute may be set aside after a cash certificate has issued has not been decided, is not before us now, and need not be decided. It is enough to point out that the sales concerned in this matter arise under a different statute and under regulations which do not contain a provision similar to the one quoted above (43 CFR, Part 257).

The Small Tract Act, as amended (*supra*), provides that "the Secretary of the Interior, in his discretion, is authorized to sell * * * a tract of not exceeding five acres [of certain categories of public lands] * * * which the Secretary may classify as chiefly valuable for residence, recreation, business, or community site purposes * * *." The question presented here is whether, after a tract of public land has been classified as chiefly valuable for one or more of the purposes stated in the statute, the land has been offered for sale and the highest bid accepted, and then a cash certificate has been issued to the successful bidder, the Secretary can now cancel the sale on a determination that the land was improperly classified for disposition under the Small Tract Act and should be either retained in Federal ownership or classified for disposal to the State for its value in a wildlife preservation program.

It is pertinent to note at this point that the regulations specifically state the policy of the Secretary of the Interior in the administration of the Small Tract Act is "* * * to safeguard the *public interest* in the lands. To this end small tract sites will be considered in the light of their effect upon the *conservation of natural resources* and upon the communities or areas involved." [43 CFR 257.2; emphasis supplied.]

In one form or another in situations involving many of the methods under which public lands are disposed of, the issue of the Secretary's authority to set aside a proposed disposition of public land when all steps except the issuance of a patent have been completed has often been litigated, both before the Department and in the courts. An early expression of the general authority of the Secretary over disposition of public lands up to the time a patent issues stated:

* * * For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney-General to take measures to annul. * * * *Pueblo of San Francisco*, 5 L. D. 483, 494 (1887), cited with approval in *Knight v. U. S. Land Association*, 142 U. S. 161, 178 (1891).

A few years later the Secretary examined in greater detail the extent of his jurisdiction over an entry which had passed through all steps necessary for the issuance of a patent, but for which a patent had not issued. At stake was a preemption entry made by Custer for which final proof had been made, acted upon and approved by the local officers, and a cash entry certificate entered upon it. About 4 months later, one Smith attacked the entry as fraudulent and void on the ground that it was made for the use and benefit of one Cavanaugh. In defense of the entry it was contended that the final receipt and cash entry certificate were conclusive evidence of the validity of the entry as far as the Department was concerned. After a lengthy discussion of the nature² of the Secretary's authority and duty in such circumstances, Secretary Vilas concluded:

These adjudications, so strongly supporting the plain reason of the matter, leave me in no doubt of the duty of the Department to cancel any entry which has been made contrary to law, or of lands not subject to such entry, or by a person not qualified to make such entry, or where compliance with the legal prerequisites to such entry did not take place, or where by false proofs a seeming compliance was fraudulently established. *Smith v. Custer et al.*, 8 L. D. 269, 279 (1889).³

² * * * The law provides for the issuance of patents by the President with all the machinery of a bureau equipped for the preservation of all information concerning the circumstances, condition and disposition of the public lands; the local offices are subordinate agencies for the transaction of the business committed to the General Land Office; the Commissioner is charged with the performance of 'all executive duties' relating to the subject; and the Secretary with supervision of the entire public business concerning the lands; and the register and receiver can act only agreeably to the rules prescribed by the Secretary. Under such circumstances, is it to be rationally supposed that the law intended to leave it to the register and receiver to disregard all the limitations and conditions prescribed by statute, or the rules of the Secretary, without any right to review their action on the part of the Commissioner, who is charged with all executive duties, or the Secretary, who is charged with supervision over all? Such a theory makes the subordinate the superior, and inverts the order of authority and administration.

"It must be conceded by all, to put a plain case, that if a pre-emption claimant should impose by his false affidavit upon the local officers the United States are entitled to some redress. Is that redress only to be had by an action in the courts? If so, from what does the necessity arise? The title is still in the government, and no right to it has been acquired. Or, suppose the local officers should be satisfied, so as to accept payment and issue a receipt, upon proofs which, upon their face, disclose plain non-compliance with law or the regulations; is the President, by whose patent alone can the title pass, bound to issue that patent? Such instances, and one readily multiplies them on reflection, demonstrate the legislation of Congress in the creation of bureau and Department to be absurd, or that this theory is inadmissible." *Smith v. Custer et al.*, 8 L. D. 269, 275-276 (1889).

³ To the same effect: *Travelers' Insurance Co.*, 9 L. D. 316 (1889).

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The problem was again fully considered in relation to public lands selected as forest lieu selections under the act of June 4, 1897 (30 Stat. 11, 34-6), which prior to patent were established to be mineral in character. The Secretary stated:

When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights. (P. 556.)

That the administration of the act in question falls within the jurisdiction of the land department there can be no doubt (*Bishop of Nesqually v. Gibbon*, 158 U. S., 155, 167). Selections under the act are therefore subject to examination by the officers of the land department until the issuance of patent. This examination is had for the purpose of ascertaining and declaring whether or not the selector, by compliance with all the necessary requisites, has entitled himself to a patent, and not for the purpose of determining whether or not these officers will consent to the selection. If the examination, whether had at the instance of third parties, claiming against the selections, or in *ex parte* proceedings, discloses that the selector has fully complied with all the necessary requisites and has honestly and correctly disclosed the title to the land relinquished and the condition and character of the land selected and that the records of the land department disclose no obstacle to the relinquishment or selection, the duty of the land officers is clear; they must patent the land to the selector and they have no discretion to do otherwise. The rights of the selector, however, attach and take effect at the point of time when he has done all that is incumbent upon him to do in the premises and are not postponed to the time when that fact is ascertained and declared by the land officers. (Pp. 560-561.)

The Department accordingly holds:

(1) That where a person making selection under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein and is to be regarded as the equitable owner thereof.

(2) That the right to a patent under the act, once vested, is, for most purposes, the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed and takes effect as of that date.

(3) That questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

These principles are in no sense antagonistic to the established doctrine of the jurisdiction and control of the land department over the disposition of the public lands. Undoubtedly such jurisdiction and control exist until patent has been issued. *Knight v. United States Land Association* (142 U. S., 161); *Michigan Land and Lumber Co. v. Rust* (168 U. S., 589); *Brown v. Hitchcock* (173 U. S., 473); *Hawley v. Diller* (178 U. S., 476). This jurisdiction extends to determining

the question, whether or not the equitable title has passed; but it has never been held that where such title has once actually vested the land department has the power to destroy it. As said in *Michigan Land and Lumber Co. v. Rust*, *supra*:

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother v. Lucas*, 12 Pet., 410, 454; *Grignon's Lessee v. Astor*, 2 How., 319; *Chouteau v. Eckhart*, 2 How., 344, 372; *Glasgow v. Hortiz*, 1 Black, 595; *Langdeau v. Hanes*, 21 Wall., 521; *Ryan v. Carter*, 93 U. S. 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. 2449; *Fraser v. O'Connor*, 115 U. S., 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, *Bagnell v. Broderick*, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

"* * * In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed."

See *Cornelius v. Kessel* (128 U. S., 456); *Orchard v. Alexander* (157 U. S., 372); and *Parsons v. Venzke* (164 U. S., 89). So, too, with respect to selections under the act of 1897. The land department has the jurisdiction and power, at any time before a patent is issued, to institute and carry on, after appropriate notice, such proceedings as may be necessary to enable it to determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. But the determination, when had, must relate to the time when, if at all, the selector has done all that is required of him in order to perfect his right to a patent. (*Kern Oil Company et al. v. Clarke*, 30 L. D. 550, 556, 560, 565 (1901); on review, 31 L. D. 288 (1902).)

Again, where an entryman under the Timber and Stone Act (43 U. S. C., 1952 ed., secs. 311-313; repealed by the act of August 1, 1955, 69 Stat. 434) had made final proof which had been accepted and paid the appraised value for the entire entry, it was held the entry could be canceled to the extent that some of the smaller legal subdivisions were not of the character subject to disposition under the act. *Albert R. Pfau, Jr.*, 39 L. D. 359 (1910). The decision concludes as follows:

And the fact that payment for the entire tract claimed was made and accepted and certificate issued by the local officers does not preclude the Commissioner or the head of the Department, prior to patent, from investigating the legality of such entry and cancelling such certificate, in whole or in part, so as to conform the entry to the law; for such is the province of the Commissioner and of the Secretary with reference to the public land business. (P. 360).⁴

The Supreme Court decisions cited repeatedly in the Department's decisions referred to above have upheld the authority claimed by the Department. In *Cameron v. United States*, 252 U. S. 450 (1920), the Court summarized these decisions as follows:

⁴For a fuller statement of the extent and limitations of the Department's authority, see *Charles W. Pelham*, 39 L. D. 201 (1910).

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By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stats., §§ 441, 453, 2478; *United States v. Schurz*, 102 U. S. 378, 395; *Lee v. Johnson*, 116 U. S. 48, 52; *Knight v. United States Land Association*, 142 U. S. 161, 177, 181, *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316.

A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. This is well illustrated in *Orchard v. Alexander*, 157 U. S. 372, 383, where in giving effect to a decision of the Secretary of the Interior canceling a preemption claim theretofore passed to cash entry, but still unpatented, this court said: "The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation. *Carroll v. Safford*, 3 How. 441; *Witherspoon v. Duncan*, 4 Wall. 210. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department." And to the same effect is *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 593, where in giving effect to a decision of the Secretary canceling a swamp land selection by the State of Michigan theretofore approved, but as yet unpatented, it was said: "It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius v. Kessel*, 128 U. S. 456; *Orchard v. Alexander*, 157 U. S. 372, 383; *Parsons v. Venzke*, 164 U. S. 89. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed."

In a series of cases decided a year later the Court held the validity of railroad indemnity land selections and State school-land lieu selections were to be determined as of the conditions existing at the time when the selections were made and completed, and were not subject to being defeated by events occurring thereafter merely because the Secretary had not yet given his approval to the selections. *Payne v. Central Pacific Ry.*, 255 U. S. 228 (1921); *Payne v. New Mexico*, 255 U. S. 367 (1921); *Wyoming v. United States*, 255 U. S. 489 (1921).

These decisions recognized as established law the principle that the Secretary could examine an entry, completed except for the issuance

of a patent, for defects or mistakes existing as of the date the entryman met his final requirements. Thus, the Court said:

* * * Of course the State's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary on coming to consider the cash entry could do otherwise than approve it, if at the time it was made the land was open to such an entry and the amount paid was the lawful price. (*Wyoming v. United States*, 255 U. S. 489, 497 (1921).)

In several rulings made after these Supreme Court decisions the Department pointed out that they did not affect the principle that the Secretary could determine whether an entry was qualified for patent as of the day the entryman completed his requirements, even after final certificate has been issued. *Henry Chamberlain*, 48 L. D. 411 (1922); *Charles R. Haupt*, 48 L. D. 355, 358 (1921); *Walker Basin Irrigation Company, John E. Morson, Receiver*, 51 L. D. 406 (1926); *John W. Stanton*, 50 L. D. 242 (1924).⁵

The headnote in the *Stanton* case states:

Where by statute payment of the purchase price is all that remains to be done by one in order to acquire title to a tract of nonmineral public land, payment thereof entitles the purchaser to an unrestricted patent, if, prior thereto, there had been no withdrawal, classification, or report that the land was prospectively valuable for mineral, unless the Government assumes the burden of proof and shows that the land was of known mineral character at that time.

The cases which have been discussed appear to establish these principles: Where one has done all that is required of him under a particular statute and has earned equitable title to a tract of public land, nonetheless so long as legal title remains in the United States, the Secretary retains jurisdiction to inquire into the validity of disposing of the land to that person. The Secretary, however, can vacate the disposal and refuse to issue patent only for proper grounds existing prior to or up to the time equitable title was earned. Thus, if only nonmineral land can be disposed of under a particular statute and an applicant is permitted to earn equitable title to a tract of land on a determination or assumption that the land is nonmineral in character, the disposal of the land can be vitiated only on a subsequent determination that the original finding of nonmineral character was in error and that facts in existence at the time equitable title passed required a determination that the land was mineral in character.

In the cases where a disposal can validly be set aside, despite the passage of equitable title, due process permits such action to be taken only after proper notice and hearing.

⁵ For later statements see: *United States v. United States Borax Co.*, 58 I. D. 426, 430 (1943); *Tolan-Dowse Controversy*, 61 I. D. 20, 24 (1952); *United States v. Al Sarena Mines, Inc.*, 61 I. D. 280, 283 (1954).

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Specifically, to set aside the sale in the case on appeal, it is necessary to find that the islands were not chiefly valuable for recreational purposes on the day that the purchasers finished their compliance with the requirements of the Small Tract Act and regulations. These findings can be made only after proper notice and hearing.⁶

The question next presented is whether a sufficient basis appears for initiating proceedings to set aside the sales concerned in this proceeding. As mentioned earlier, the State Conservation Department asserts that the islands should be kept as a refuge for birds. In this the Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, of this Department, has concurred. In a memorandum dated March 14, 1957, to the Director of the Bureau of Land Management, the Acting Director of the Bureau of Sport Fisheries and Wildlife stated:

The U. S. Fish and Wildlife Service has made a major effort in the location of isolated tracts of vacant public domain that are of importance to the perpetuation of wildlife for future generations. Most of these small isolated tracts are not of national significance, but their importance from a wildlife standpoint is so great that the State conservation departments have requested these lands to be dedicated for public purposes. While the Bureau of Land Management offices have been consulted on many occasions in order to ascertain the location of these tracts, it is most difficult to keep currently advised of the availability of such areas, and we are most sympathetic with the view expressed by the State of Wisconsin that these islands are important to the public as breeding grounds for aquatic birds and waterfowl.

The records of the Service indicate that both of the islands in question are very important areas for colonial nesting birds including gulls, terns, and cormorants, as well as other species. We are of the opinion that the tracts will serve the highest public purpose if they are dedicated to wildlife protection.

More recently, in a memorandum to the Solicitor, dated September 17, 1957, the Director of the bureau called attention to the memorandum of March 14, 1957, and stated:

If it is possible to set aside the private sales and to transfer the islands to the State, the preservation of these breeding grounds for aquatic birds and waterfowl would be a material contribution to wildlife conservation.

Accordingly, the Bureau of Land Management is instructed to inform the State Conservation Department that a hearing will be held on its protest against the sale of the islands to Russell and Hayes. Although the Conservation Department is not a qualified contestant, as defined in the regulations (43 CFR, 1954 Rev., 221.51 (Supp.)), the Department may direct that appropriate action be taken on its objections to the completion of the sale (*id.*, 221.52). In these circumstances, it seems fitting that the State Conservation Department be

⁶ As to the necessity of a hearing, see *United States v. Al Sarena Mines, Inc.*, 61 I. D. 280, 283 (1954); *United States v. Keith V. O'Leary*, 63 I. D. 341 (1956); *Cameron v. United States*, 252 U. S. 450, 460-461, and cases cited; *Hawley v. Diller*, 178 U. S. 476, 488-489 (1900).

directed to proceed in this matter as though it were initiating a contest and to follow all the pertinent provisions of the regulations relating to contest as set out in 43 CFR 251.53 *et seq.* The matter will thereafter be subject to the rules relating to contests. If the State Conservation Department, or some other duly authorized State agency, does not file a complaint within 20 days from the receipt of this decision, its protest will be dismissed and the sales completed.

The decision of the Director of the Bureau of Land Management accordingly is set aside and the case is remanded for further proceedings consistent herewith.

ROGER ERNST,
Assistant Secretary.

APPEAL OF YOUNG AND SMITH CONSTRUCTION COMPANY

IBCA-151

Decided June 18, 1958

Contracts: Subcontractors and Suppliers—Rules of Practice: Appeals: Standing to Appeal

The action of a prime contractor in filing a claim with the contracting officer on behalf of a subcontractor does not in itself suffice to ground an appeal to the Board of Contract Appeals that is subsequently taken by the subcontractor alone. A provision in a subcontract making the subcontractor subject to all the terms of the prime contract is insufficient to create privity of contract between the Government and the subcontractor, even though the prime contract provides also that all subcontracts shall be subject to the approval of the contracting officer.

BOARD OF CONTRACT APPEALS

This disposes of an appeal by Young and Smith Construction Company, a subcontractor for United Concrete Pipe Corporation, from the findings of fact and decision of the contracting officer, dated January 2, 1958, denying three claims for additional compensation submitted by the prime contractor on behalf of the subcontractor, under Contract No. 14-06-D-971, dated June 28, 1954.

The contract, which was on U. S. Standard Form No. 23 (revised March 1953) and embodied the General Provisions of U. S. Standard Form 23A (March 1953), provided for construction and completion of the bifurcation structure and the earthwork at the west portal of the gateway tunnel, and the earthwork pipelines, and structures, from Station 8+36.82 to Station 935+05, Davis Aqueduct, under Schedules Nos. 1, 2, and 3 of Specifications No. DC-4171, Weber Basin Project, Utah, Bureau of Reclamation.

The United Concrete Pipe Corporation as a prime contractor subcontracted to the Young and Smith Construction Company various items of work under Schedules Nos. 1, 2, and 3, which appear to have consisted principally of the excavation, backfill, and riprap work.

June 18, 1958

The record shows that the United Concrete Pipe Corporation, the prime contractor, upon the completion of all the work under schedule 1, executed a release on contract dated February 19, 1957, in which no claims at all were reserved against the Government. However, upon completion of the work under schedules 2 and 3, the prime contractor, in executing its release on contract, dated September 5, 1957, reserved a claim described as "presented by the Contractor for and on behalf of one of its subcontractors, Young & Smith Construction Company, in the sum of 700,000—Exhibit 'B' attached to the previous submissions." In transmitting this release to the Government with its letter of July 22, 1957, the prime contractor stated:

We have no particular knowledge of the claim of \$700,000.00, which we are presenting for and on behalf and at the request of one of our subcontractors, Young & Smith Construction Co.

In the so-called "Exhibit B," which was in the form of a letter to the contracting officer, the subcontractor spoke of four major areas to be considered as the basis for the relief sought but actually stated only 3 items of claim, as follows:

1. Request for payment of excavation outside of the specified lines contained in the plans.
2. Request for payment for hauling backfill excessive distances.
3. Request for adjustment based on factual misrepresentations of conditions in the plans showing the drill hole findings.

In his findings of fact and decision of January 2, 1958, the contracting officer took the position that he could not consider any of the claims, in so far as they related to work under Schedule 1, in view of the execution by the prime contractor of the release on contract for the work covered by this schedule without exceptions. Although the contracting officer also made comments on the merits of Claim Items 1 and 2, he expressly invoked the provision of Paragraph 11 of the specifications, which required the contractor to make timely protest against work which it considered to be beyond the requirements of the contract, and rejected the claims on this ground. The contracting officer also rejected Claim Item 3 on the ground that in so far as the claim was based on misrepresentation, it was a claim for unliquidated damages, and that in so far as it might be based on the "changed conditions" clause of the General Provisions of the contract it was barred by the failure of the contractor to comply with the notice requirement contained therein. Nevertheless, the contracting officer extensively reviewed the merits of the claim.

The subcontractor's Notice of Appeal dated February 21, 1958, is headed "Appeal of Young & Smith Construction Company—Subcontractor," and is signed by Richard T. Cardall, who describes himself as "Attorney for Petitioners." In addition to disputing some of the contracting officer's comments on the merits of the claims, and an

assertion by him that he could not base a decision on considerations of "equity and good conscience," the said attorney also states:

This subcontractor claimant submits that since they had no advance notice from the Bureau or the *prime contractor* that schedule number 1 was being released that such a release by the *prime contractor* should not constitute a bar to recovery on the claim for work covered by schedule numbered 1 "if otherwise allowable." [Italics supplied.]

By memorandum dated March 28, 1958, the Government submitted a statement of its position, requesting that the appellant's claims be dismissed on the various procedural or jurisdictional grounds advanced in the findings and decision of the contracting officer, and, in addition, on the ground that the subcontractor lacked standing to file the appeal. The appellant has failed to reply to the statement of the Government's position.

On the basis of the record, the Board must find that the prime contractor executed an unconditional release of all claims involving work under Schedule 1, and holds that the claims of the appellant in so far as they relate to work covered by the said schedule are barred by the release. It is immaterial, so far as the Board is concerned, that the prime contractor gave no notice to the appellant that claims under Schedule 1 were being released, since it is well settled that there is no privity of contract between the Government and a subcontractor performing work for the prime contractor under the provisions of the U. S. standard form of Government construction contract.¹ It is true that in the present case the subcontract contained a provision making the subcontractor subject to all the terms of the prime contract but the Court of Claims has held that such a provision is insufficient to create privity of contract between the Government and the subcontractor, even though it is accompanied by the further provision in the prime contract that all subcontracts shall be subject to the approval of the contracting officer.²

As the contracting officer has invoked the contractor's failure to file a timely protest with respect to Claim Items 1 and 2, the Board must also hold that these items of claim are barred by reason thereof.

As the contracting officer, judging from the comments in his findings, appears to have rather extensive knowledge of the circumstances which might furnish the basis for a claim of "changed conditions" under clause 4 of the General Provisions of the contract, the Board does not deem it desirable to determine whether such a claim should be deemed barred by the prime contractor's failure to comply with the notice requirement of this provision.

¹ *Merritt v. United States*, 267 U. S. 338 (1925); *United States v. Blair*, 321 U. S. 730, 737 (1944); *Continental Illinois National Bank et al. v. United States*, 112 Ct. Cl. 563, 565 (1949); *Brister & Koester Lumber Corp. v. United States*, 116 Ct. Cl. 824, 848 (1950); *John Matthew Kilgore et al. v. United States*, 121 Ct. Cl. 340, 373 (1952).

² *Continental Illinois National Bank et al. v. United States*, *supra*, at p. 566. No provision for approval of subcontracts was included, moreover, in the contract documents in the present case.

June 18, 1958

The Board holds, however, that such a claim, as well as the others asserted by the subcontractor, may not be considered by the Board because the subcontractor, in view of the lack of privity of contract between the Government and it, lacks standing to present an appeal to the Board.

It is true, of course, that a prime contractor may file, with the contracting officer, a claim on behalf of its subcontractor, and appeal from an adverse determination by the contracting officer. The prime contractor presented the claims in the present case to the contracting officer on behalf of its subcontractor, although without attempting to assign specific amounts to any of the items of claim, but the prime contractor has wholly failed to give even an indication that it wishes to join in the appeal from the adverse decision of the contracting officer. The question presented is, therefore, whether the action of the prime contractor in filing the claims on behalf of the subcontractor sufficed also to ground the appeal.

The Board must answer this question in the negative, since clause 6 of the General Provisions of the contract—the “disputes” clause—clearly envisages two separate steps in the handling of a dispute “which is not disposed of by agreement.”

The first step is initiated by the contractor requesting the contracting officer to make written findings of fact. It is probable that the majority of disputes end at this level with this action of the contracting officer. The contractor may, however, take a second step. It may take a written appeal from the findings of fact and decision of the contracting officer within 30 days of the receipt of a copy of the findings. As the taking and prosecution of an appeal involves usually an additional and greater expenditure of time and money, it can hardly be regarded as automatic. As the two steps require separate actions on the part of the contractor, the first action does not necessarily presuppose that the other will follow. Thus, since no timely action was taken by the prime contractor in taking the appeal on behalf of the subcontractor, the latter's appeal to the Board must fail.³

There may be circumstances in a case which would indicate, to be sure, that the prime contractor has in effect ratified the action of the subcontractor in taking the appeal. Such circumstances are wholly absent, however, in the present case. On the contrary, the fact that the prime contractor released the claims under Schedule 1 indicates rather that the prime contractor has consulted its own interests and has not been acting entirely in harmony with the subcontractor. Moreover, neither the contractor nor the subcontractor has done anything to supply evidence of an act of ratification since the filing of the statement of the Government's position. Whether a prime con-

³ *Forest Box & Lumber Co., Inc.*, ASBCA No. 2916 (1956).

tractor could ratify a subcontractor's action in taking an appeal after the expiration of the 30-day period allowed by the "disputes" clause for the taking of an appeal is a question which need not be decided in the present case.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the appeal is dismissed.

THEODORE H. HAAS, *Chairman.*

We concur:

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

APPEAL OF UTILITY CONSTRUCTION COMPANY

IBCA-149 and IBCA-161

Decided June 19, 1958

Contracts: Delays of Contractor—Contracts: Notices—Contracts: Contracting Officer

When a contractor who was seeking an extension of time for the performance of a contract claimed that the cause of delay in completion was attributable to the conduct of an inspector who had died before the completion of the contract and that he had been dissuaded from notifying the contracting officer of the cause of the delay by the assurance of the inspector that he would be granted an extension of time, the Board will not disturb the decision of the contracting officer that an extension of time should be denied because of the failure of the contractor to give written notice of the cause of the delay in the absence of proof that the merits of the claim could still be ascertained and that the inspector gave the assurance claimed.

BOARD OF CONTRACT APPEALS

Utility Construction Company of Ontario, Oregon, has appealed from findings of fact and decisions, dated December 23, 1957, and March 13, 1958, of the contracting officer which denied in part its requests for extension of time for the completion of Contract No. 14-06-D-1804, dated May 2, 1956, with the Bureau of Reclamation.

The contract, which was made on U. S. Standard Form 23 (revised March 1953), and incorporated the General Provisions of U. S. Standard Form 23A (March 1953), provided for the rehabilitation of the Ontario-Nyssa Pumping Plant of the Owyhee Project of the Bureau of Reclamation at the estimated contract price of \$157,845.50.

Notice to proceed with the work under the contract was received by the appellant on May 14, 1956. As under paragraph 16 of the

June 19, 1958

specifications the work was to be completed within 335 calendar days from the date of the receipt of such notice, April 14, 1957, was established as the completion date. The work was delayed by a nation-wide steel strike, which prevented delivery of reinforcing steel, and by findings of fact dated April 26, 1957, the time for completion of the contract work was extended 50 calendar days to and including June 3, 1957. The work was further delayed by reason of discrepancies in the fabrication of Government-furnished motor-control equipment, and by findings of fact dated December 23, 1957, the time for completion of the contract work was further extended by 58 calendar days to and including July 31, 1957. All work under the contract was not substantially completed until October 23, 1957. There was thus a delay of 84 calendar days in the completion of the work under the contract.

Under date of January 10, 1958, the appellant filed a notice of appeal from the contracting officer's findings of fact of December 23, 1957. This appeal appeared to have no relation, however, to the cause of delay covered by the findings. It alleged rather that the delay in the completion of the work had been caused by the overzealous conduct of the Government inspector in the discharge of his inspection duties that led him to insist on personally overseeing all the work, although it proceeded at a more rapid rate than his capacity to oversee it, and to require even that work which had been properly performed be redone under his supervision.

The contracting officer decided to treat this alleged cause of delay as the basis of a new claim for an extension of time, and under date of March 13, 1958, issued another finding of fact and decision in which he denied the same on the ground that the appellant had not given notice of the alleged cause of delay as required by clause 5 of the General Provisions of the contract.¹ The contracting officer pointed out that the inspector to whom the alleged cause of delay was attributed by the appellant had died during November 1957 before the work under the contract had been completed.

Under date of March 14, 1958, which was one day after the issuance of the contracting officer's findings of fact and decision, Department Counsel filed a statement of the Government's position with respect to the appeal of January 10, 1958, in which he moved that this appeal be dismissed in view of the action taken by the contracting officer in issuing the findings of fact and decision the previous day.

Under date of March 21, 1958, the appellant filed a notice of appeal

¹ This clause provided that the contractor should not be charged with liquidated or actual damages "because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor," provided that the contractor gave notice of the cause of the delay within ten days from the beginning of any such delay. It was also provided that the contracting officer could extend the time for giving notice, however, at any time prior to the date of the final settlement of the contract.

from the findings of fact and decision of March 13, 1958, in which he reiterated the allegations contained in his previous notice of appeal and explained his failure to give notice of the alleged cause of delay, as follows:

That the contractor informed the Inspector that it would be necessary for him to notify the Contracting Officer that the conduct of the Inspector was causing a delay and that the Contractor could proceed with far more rapidity, but that the Inspector informed the Contractor that it would not be necessary to give such notification in writing and represented to the Contractor that he would be granted extensions of time corresponding with the delays caused by the inability of the Inspector to examine the work properly.

Under date of May 9, 1958, Department Counsel filed a statement of the Government's position with respect to the second appeal which is that the appellant is attempting to blame the delay in completing the contract on a Government inspector who has died, and that the appeal should, therefore, be dismissed, without a consideration of the merits, because of the failure of the appellant to give the notice required by Clause 5 of the General Provisions of the contract. The Government argues that the truth of the appellant's charges cannot now readily be ascertained because of the death of the Government inspector.

Conceivably, despite the demise of the inspector, proof of the appellant's allegations might be available, either in the form of sworn testimony of the officers or employees of the appellant or in the form of circumstantial evidence derived from the nature or progress of the work itself. If the Board were satisfied that the merits of the appellant's claim could still be determined, and that, moreover, the inspector's assurances or representations were responsible for the appellant's failure to notify the contracting officer in writing of the cause of the delay, there would not be an insuperable obstacle to a consideration of the merits of the appellant's claim, since in a proper case the failure to give notice could have been waived.

However, the appellant has not filed a reply to the statement of the Government's position, although the time for doing so has expired, nor has it requested a hearing at which it might substantiate its contentions by proper proof. Moreover, it is inherently improbable that the personnel of the appellant should have relied on the inspector to report his own shortcomings, if not misconduct, to the contracting officer.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509; as amended; 19 F. R. 9428), the first appeal is dismissed, and the findings of fact and decision of the contracting officer in the second appeal are affirmed.

WILLIAM SEAGLE, *Member,*

June 23, 1958

I concur:

HERBERT J. SLAUGHTER, *Member*.

THEODORE H. HAAS, Chairman of the Board, did not participate in the disposition of this appeal.

D. MILLER

A-27591-A

Decided June 23, 1958

**Oil and Gas Leases: Termination—Oil and Gas Leases: Relinquishments—
Oil and Gas Leases: Rentals**

The act of July 29, 1954, which provides for the automatic termination of leases upon failure of the lessee to pay the annual rental when it is due, does not permit a lessee, by submitting a partial payment of the annual rental for designated acreage in his lease, in effect to relinquish a portion of his lease and to have the portion of the lease represented by the partial payment continue in effect.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

D. Miller has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated August 21, 1957, which affirmed the decision of the manager of the Denver, Colorado, land office, dated January 21, 1957, holding that his noncompetitive oil and gas lease Colorado 05625 had terminated as of January 2, 1957, by operation of law under the act of July 29, 1954 (30 U. S. C., 1952 ed., Supp. V, sec. 188).

Oil and gas lease Colorado 05625 was issued to Noel Teuscher on January 1, 1953. The lease embraced a total of approximately 860.77 acres. On July 1, 1956, an assignment of the lease in its entirety to the appellant became effective. Consent to have the lease governed by the automatic termination provisions of the act of July 29, 1954, was filed by the appellant.

On December 31, 1956, the appellant submitted a check in the sum of \$70 as the rental payment of the fifth year's advance rental which became due on January 2, 1957. On the face of the check was a notation that it was in payment for "Land in 6 N., R. 81 West only Sec. 22: E $\frac{1}{2}$ NW $\frac{1}{4}$; W $\frac{1}{2}$ SE $\frac{1}{4}$; E $\frac{1}{2}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$ SE $\frac{1}{4}$." A receipt was issued to the appellant, which showed that the amount payable was \$215.25, the amount paid was \$70 and the balance was \$145.25.

By a decision dated January 21, 1957, the manager held that the lease was deemed terminated as of January 2, 1957 "since proper rental was not paid on the lease * * *."

In his appeal to the Director the appellant stated only that "It is felt that the decision is erroneous and that there is no reason why rental payment cannot be made for part of the land in the lease and

for the lease to continue for these lands." The appellant also indicated that he was willing to pay the \$145.25 balance of the rental and for the lease to remain in effect for all of the lands.

In his decision the Acting Director correctly pointed out that there is no provision of law or the Department's regulations which authorizes partial payments of annual rentals. He also pointed out that the notation on the check cannot be accepted as a partial relinquishment inasmuch as it fails to comply with section 5 of the terms of the lease or the Department's regulation, 43 CFR 192.160, governing relinquishments.

The act of July 29, 1954, which amended section 31 of the Mineral Leasing Act (30 U. S. C., 1952 ed., Supp. V, sec. 188), provides in pertinent part as follows:

* * * Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: *Provided, however,* That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made.

There is nothing in the language of this provision which states or suggests that it may be used as a means of effecting a partial relinquishment of a lease. There is also nothing to indicate that if less than the full amount of the rental due is paid, the lease will terminate only as to the acreage for which rental has not been paid. In other words, if anything less than the full amount of rental due is paid, the lease will terminate in its entirety and not merely in part.

As the appellant did not pay the full annual rental due on or before the anniversary date of the lease, his lease was automatically terminated in its entirety by operation of law.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director, Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

UNITED STATES v. REED H. PARKINSON

A-27714

Decided June 23, 1958

Rules of Practice: Appeals: Standing to Appeal—Rules of Practice: Hearings

An order of a hearing examiner denying a motion to postpone a hearing is not an appealable order and the movant has no right to appeal from the denial of his motion.

June 23, 1958

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

In a notice dated April 15, 1958, a hearing examiner of the Bureau of Land Management set a hearing in Nevada mining contest cases Nos. 2738-2743, incl., involving charges brought by the United States against Reed H. Parkinson. The hearing was set for June 9, 1958. On May 19, 1958, the attorney for Parkinson filed a motion to postpone the hearing "to a later date." Following objections filed by intervenors in the case, the examiner on May 22, 1958, issued an order denying the motion. Thereupon, Parkinson on June 2, 1958, filed a notice of appeal to the Director of the Bureau of Land Management from the examiner's order.

On June 4 the examiner wired the Director asking whether an appeal from his order was proper or whether he had discretion to proceed with the hearing as scheduled. On the same day the Acting Director advised the examiner by return wire that if the latter's order had been received by the contestee he should proceed with the hearing as scheduled. The next day Parkinson's attorney, in a telegram referring to the Acting Director's wire of the previous day, asked the Director to direct the examiner to vacate the hearing scheduled for June 9. The Director immediately replied that the examiner was to proceed with the hearing as scheduled. Upon receipt of this advice, Parkinson filed a notice of appeal, dated June 7, to the Secretary of the Interior from the Director's action. The appeal was received in the Solicitor's office on June 10.

Meanwhile, according to a report from the examiner, Parkinson and his counsel appeared at the hearing on June 9. Counsel orally moved to continue the hearing pending the outcome of the appeal to the Secretary. The examiner denied the motion on the basis that his order of May 22 was not appealable. Parkinson and his counsel left the hearing and the Government then put on its case. On the same date, June 9, Parkinson prepared another notice of appeal to the Secretary from the examiner's refusal at the hearing to continue it despite the pendency of the previous appeal to the Secretary. Parkinson contends that pending the disposition of the prior appeal the examiner had no jurisdiction to proceed with the hearing.

The basic issue presented by the appeals is whether there is any right to appeal from an examiner's order denying a motion to postpone a hearing. The answer to this is "no."

In a recent decision by the Director of the Bureau of Land Management, approved by Assistant Secretary Ernst on August 15, 1957 (*United States v. Keith V. O'Leary et al.*, Contest No. 5168, Sacramento Misc. 68381), the following situation was considered: One day before the date set by the hearing examiner for the rehearing in a mining contest case, the contestees filed a motion to dismiss and a demurrer to the proceedings. At the hearing, the examiner continued

it for 15 days and announced he would rule on the motion at the later date. He cautioned the parties, however, to be prepared to proceed with the hearing on the merits. At the continued hearing the examiner denied the motion to dismiss, overruled the demurrer, and ordered the hearing to proceed on the merits. The contestees stated that they would await a ruling on appeal from the ruling of the examiner and left the hearing. The Government then put on its case.

Relying on the case of *United States v. Al Sarena Mines, Inc.*, 61 I. D. 280 (1954), the Department in the *O'Leary* case dismissed the appeal from the hearing examiner's ruling as premature. The Department said:

* * * In administrative hearings of the type here involved it is considered that rulings of the examiner in the proceedings are interlocutory in nature and the taking of an appeal therefrom prior to the rendering of a decision by the hearing examiner, in accordance with the record assembled, is premature. The Departmental rules of practice (43 CFR Part 221; Circular 1950, effective May 1, 1956, and Circular 1962, effective October 4, 1956), do not provide for appeals from rulings of a hearing examiner in the conduct of a hearing, preliminary to the rendering of his decision in the matter. They provide for written decisions in hearings cases by the examiner (221.76) and that parties adversely affected by such decisions may appeal to the Director as provided in Subpart A of Part 221, CFR (221.77). The regulations specify that the initial decision as a result of a hearing shall be made by the hearing examiner and shall be served upon all parties to the case (221.76b), unless the Director has required the examiner to make only a recommended decision in the matter (221.76c). A recommended decision was not required in the subject case.

The appeal is therefore dismissed as premature, and the record will be returned to the hearing examiner for his decision in the matter of the contest proceeding.

* * *

This statement is dispositive of this case. A ruling on a motion to postpone a hearing is clearly interlocutory in nature, much more so than the motion to dismiss and demurrers considered in the *O'Leary* and *Al Sarena* cases. Parkinson's appeals are premature and must be dismissed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the appeals are dismissed.

EDMUND T. FRITZ,
Acting Solicitor.

HENRY S. MORGAN ET AL.

A-27556

Decided June 30, 1958

Patents of Public Lands: Amendments

Section 2372 of the Revised Statutes, as amended, authorizing the amendment of entries and patents in order to correct errors in the description of lands entered and the regulations issued pursuant thereto do not permit amendment of a patent in behalf of persons who are not transferees deriving title

June 30, 1958

from the one who entered or located the land covered by the patent the amendment of which is being sought or transferees of such entryman as to the land which it is sought to have the patent amended to cover.

Patents of Public Lands: Amendments—Applications and Entries: Amendments

By departmental regulation entries which are void *ab initio* are not subject to adjustment or amendment under section 2372 of the Revised Statutes, as amended.

Patents of Public Lands: Amendments

Patents to public land cannot be amended pursuant to section 2372 of the Revised Statutes, as amended, where the showing required by the statute as to the circumstances of the error is not made.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Henry S. Morgan has appealed to the Secretary of the Interior from a decision of August 27, 1957, as modified on September 4, 1957, for the Director of the Bureau of Land Management which rejected in part Mr. Morgan's oil and gas lease offer BLM 040686. The appellant's application, filed on August 19, 1955, covering 160 acres of land in Alabama, was rejected as to 40 acres described as the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W., St. Stephens M., Alabama. Mr. Morgan's offer was partially rejected because it conflicted with an application, filed on April 23, 1951, by Lawrence F. and Hudson P. Ballard for the amendment of a patent of June 15, 1857, issued on military bounty land warrant 51489 in the name of Emily H. Turner. The Ballards and others interested in the amendment application¹ filed a brief in this proceeding in support of the partial rejection of Mr. Morgan's application.

The Ballard application for amendment requests the issuance of a new or supplemental patent correcting the description of the land covered by the 1857 patent issued on military bounty land warrant 51489. The 1857 patent to Emily H. Turner granted title to the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 19, T. 2 S., R. 2 W., St. Stephens Meridian, Alabama. The applicants request that a new patent be issued on the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W., or on the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W. Inasmuch as the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W., was patented by the United States to Park D. Ballard on February 10, 1916, the amendment application can be considered only as requesting a patent on the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W., which is vacant public land according to the records of the Bureau and the same land for which Mr. Morgan filed his lease offer here under consideration.

The only provision under which the application for amendment could be allowed is section 2372 of the Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 697), which authorizes the amendment,

¹ Others who joined in the answer and reply to Mr. Morgan's appeal are: W. D. Reams, Eugene S. Wells, Mrs. Dorothy Blewett Walker, Mrs. Mildred B. Hanlein, and Gulf Oil Corporation.

under certain conditions, of entries and patents in order to correct errors in the description of lands entered and intended to be entered (see 43 CFR, Part 104). The statute applies only to cases of mistake in description at the time of an entry whereby the entryman's intent was defeated (cf. *Elbert L. Sibert*, 40 L. D. 434 (1912); *Fred G. Wagner*, 21 L. D. 556 (1895)).²

On October 1, 1853, Emily H. Turner, assignee of Josiah Watts' military bounty land warrant 51489, issued under the act of September 28, 1850 (9 Stat. 520), located 79.025 acres of land described in the register's and receiver's receipt No. 391 for the land warrant and in the patent issued on the warrant as the $W\frac{1}{2}NW\frac{1}{4}$ sec. 19, T. 2 S., R. 2 W., S. S. M. However, excess receipt No. 10,456 issued in connection with the location of military bounty land warrant 51489 acknowledges payment by Emily H. Turner for 39.025 acres in the $W\frac{1}{2}NW\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W. " * * * being excess in said tract over the area located in virtue of Military Land Warrant No. 51,489 * * *." ³ On the basis of the reference in the excess receipt to land in T. 2 N. (rather than in T. 2 S. as the land is described in the register's and receiver's receipt and in the patent), and because an abstract of title of the $SW\frac{1}{4}NW\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W., shows a conveyance of a half interest in the $W\frac{1}{2}NW\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W., from Emily Turner, the amendment applicants assert that Emily H. Turner intended to locate the military warrant on land in T. 2 N. and not on the land in T. 2 S. for which a patent was issued to her pursuant to her location of bounty land warrant 51489.

After a careful review of all of the material submitted in support of the amendment application and of the pertinent departmental records it is clear that the amendment application must be rejected for several reasons.

In the first place, so far as the records on this appeal indicate, the amendment applicants are not claimants of any part of the land in T. 2 S. which was patented to Emily H. Turner on June 15, 1857, and it is the patent on this land which they wish to have amended. Neither are the applicants transferees through Emily H. Turner of the $SW\frac{1}{4}NW\frac{1}{4}$ sec. 19, T. 2 N. The applicable statutory and regulatory provisions authorize amendment on behalf of the entryman, selector, locator, his legal representatives, or his transferees, when the claim is transferable. 43 CFR 104.5 provides in pertinent part that:

² 43 CFR 104.3 "Nature and source of error; good faith. The application must contain a full statement of all the facts and circumstances, showing how the mistake occurred and what precautions were taken prior to the filing of the erroneous entry, selection, or location, to avoid error in the description. The showing in this regard must be complete, because no amendment will be allowed unless it is made to appear that proper precaution was taken to avoid error at the time of making the original entry, location, or selection; and where there has been undue delay in applying for amendment, the application will be closely scrutinized, and will not be allowed unless the utmost good faith is shown, and the delay explained."

³ The excess receipt, signed by the receiver, was issued on the same date, September 27, 1853, as the register's and receiver's receipt No. 391 for the land warrant.

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* * * where amendment is sought by a transferee, it must be shown by a certificate from the proper recording officer of the county in which the land is situated, or by satisfactory abstract of title, that the applicant is the owner of such land under the entry, location, or selection, as the case may be * * *. Where patent has been issued, reconveyance of the land embraced in the patent must be made by deed executed by the claimant * * * such deed to be accompanied by a satisfactory abstract of title or a certificate from the register of deeds in and for the county in which the land is situated, showing the title to be clear and free of encumbrance.

The amendment applicants are not only not transferees or claimants of the land in T. 2 S., which was patented to Emily H. Turner, but a decree of June 15, 1926, in the Circuit Court of Mobile County, Alabama, quieted title to the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 19, T. 2 S., R. 2 W., against the unknown heirs and devisees of Emily H. Turner *et al.*, and vested title to this land in A. H. Sturtevant.

Although the amendment applicants assert a record color of title claim to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W., this claim is not derived through Emily Turner's conveyance of the land.⁴ An abstract of title of the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 N., indicates that on October 5, 1853, Emily Turner conveyed to Duncan A. W. Patterson an undivided half interest in the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W. (and other land not here involved). There is no further record of conveyance or transfer of either Turner's or Patterson's claim to this land, i. e., the abstract of title shows a break in the chain of title after Turner's 1853 conveyance. By tax deed dated December 23, 1912, the State of Alabama purportedly sold the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W., to Park D. Ballard through whom the applicants claim title. It is noted incidentally that Park Ballard knew that the United States claimed title at least to the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 N. because, after purchasing the land from the State, he made timber or stone entry (Montgomery 09323) on this tract pursuant to which patent was issued to him by the United States on February 10, 1916.

As the applicants are not transferees of Emily Turner who located the land covered by the patent which they wish to have amended, it is concluded that they are not proper applicants for the amendment of the patent on the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 S., R. 2 W.

⁴ It is doubtful that if the applicants were transferees claiming directly through Turner's conveyance of the land in T. 2 N. that their application could be allowed. Section 2372 of the Rev. Statutes, as amended, has been construed as extending to situations where the mistake in description of an entry can be corrected by changing the record description of the land entered (see paragraph 8 in Circular, 37 L. D. 655 (1909), and in Circular No. 423, 44 L. D. 181 (1915), and also paragraph 3 in the same circulars). The description which the applicants are trying to change is the description of land in T. 2 S., not the description of land in T. 2 N.

The provision of the statute authorizing the transfer of the payment from the tract erroneously entered to that intended to be entered, and certainly the regulatory requirement that transferees who are seeking amendment of a patented entry reconvey to the United States the lands which were mistakenly entered seem to preclude the allowance of an amendment of a patented entry on the application of one who cannot reconvey to the United States title to land which was mistakenly entered, selected, or located (cf. *Harold K. Butson*, A-26285 (December 29, 1951)).

Moreover, for many years, the Department has interpreted the statute allowing the amendment of entries as precluding the adjustment of entries by way of amendment when an entry is void *ab initio* (see Circular, 37 L. D. 655, 658 (1909); Circular No. 423, 44 L. D. 181, 186 (1915)). 43 CFR 104.13 provides:

Entry improperly allowed not to be amended. Where entries, selections, or locations are improperly allowed, as where the lands are not subject to such entries, selections, or locations, amendments will not be allowed, because such claims, being invalid, should be canceled, and upon cancellation thereof a new entry, selection, or location may be allowed as though the former had never been made.

The records in this case indicate that the Turner location of military bounty land warrant 51489 was void as to one-half of the lands purportedly covered by the location. On March 10, 1843, the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 S., R. 2 W., S. S. M. was patented to Henry Brannan (spelled Branen in the purchase certificate) pursuant to his cash entry 8933, allowed on September 11, 1841. Thus Emily Turner's location and patent on the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 S., R. 2 W., more than 10 years after the land had been patented were void *ab initio*. Accordingly, the amendment of the Turner patent as to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 S., R. 2 W. is forbidden by departmental regulation 43 CFR 104.13.

Finally, it should be mentioned that there is no evidence in this record which complies with the regulatory and statutory requirements that applicants for amendment give a full statement of the facts and circumstances showing how the mistake occurred, what precaution was taken to avoid error in the description before filing, and showing that proper precaution was made to avoid error at the time of making the original entry (see footnote 2). It seems unlikely that such a showing can be made now after more than 100 years has elapsed since the occurrence of these events, but in the absence of such a showing, the statute here under consideration does not permit the requested amendment. *Harold K. Butson, supra*, footnote 4.

For the reasons mentioned herein, the application for the amendment of the Turner patent issued on military bounty land warrant 51489 cannot be allowed and that application does not preclude the issuance of an oil and gas lease on the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 2 N., R. 2 W. Accordingly, the rejection of the appellant's lease offer was improper and it should be reinstated if all else is regular.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision rejecting the appellant's oil and gas lease offer is reversed and the case is remanded to the Bureau of Land Management for action consistent with this decision.

EDMUND T. FRITZ,
Deputy Solicitor.

ESTATE OF JOHN MUSMUSTOO

DECEASED YAKIMA ALLOTTEE NO. 3516

IA-712

*Decided May 28, 1958**

Indian Lands: Descent and Distribution: Generally—Rules of Practice: Evidence

Where the evidence upon which an Examiner of Inheritance determined the heirs of a deceased Indian is conflicting and it appears that essential testimony may be available which has not been obtained, the case will be remanded for a further hearing.

APPEAL FROM AN EXAMINER OF INHERITANCE
BUREAU OF INDIAN AFFAIRS

Gertrude Burke or See-bote How-wash-mein has appealed to the Secretary of the Interior from a decision by an Examiner of Inheritance, dated December 1, 1955, denying, after a rehearing, her claim as the surviving wife of John Musmustoo, deceased Yakima allottee No. 3516. It was determined in the original order in this case, entered by an Examiner of Inheritance on December 17, 1954, that the decedent had died intestate on June 30, 1954, and that his sole heir was his daughter, Yvonne Musmustoo. This daughter was the issue of the decedent and his wife, Rose Miller, from whom he had been divorced by court proceedings about the year 1938. Upon the filing of a petition for rehearing in behalf of the appellant, presenting her claim that she was the decedent's surviving wife according to the Indian custom, a further hearing was ordered and held.

The record in the present case is conflicting. In such circumstances, this office normally would be disposed to follow the Examiner's recommendations or decision since he had the opportunity to observe the witnesses and to evaluate the probative effect of their testimony. However, the present record presents situations which we think require a different course of action at this time. It is believed that possible avenues for the development of more complete information on the sole issue in this case have not been fully explored. For instance, appellant testified that she paid the decedent's funeral expenses in the amount of \$598.70, for which payment she appears to have a receipt. The appellant stated further that a partial payment on the funeral expenses was made from funds borrowed by her from the tribe, and that the remainder of such bill was paid from her own money and from the decedent's rent money which had been turned over to her. While the exact amount spent by the appellant on the decedent's funeral was disputed, there is other recognition that she did make expenditures in that respect. This circumstance, together with the

65 I. D., No. 7

*Not in chronological order.

allegation that some of the decedent's funds were turned over to the appellant, require further explanation to the extent that such transactions may touch upon the relationship of the parties concerned.

The record also seems to be deficient in its lack of testimony from persons who may have vital information regarding the decedent and his alleged marital activities. As another instance in this connection the names of various individuals were mentioned who attended a ceremony following the decedent's death, at which time the appellant alleged that she had assumed the black clothing of a widow. However, some of those persons did not testify, neither is there any explanation why their testimony was not obtained. Moreover, a statement made by the lessee of the property of the decedent should have been further explored. Such lessee stated in an affidavit that recognition has been given to the appellant's status as a widow of the decedent because she executed a lease covering the decedent's lands on October 25, 1954, and that such lease was approved by the superintendent on the same day.

While it is true that the burden of obtaining witnesses to prove a point rests with the appellant or the proponent of a certain contention, neither can factors be disregarded which on their face indicate that essential data may be available which has not been obtained and without explanation as to why such information was not made available. Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509, as revised, 22 F. R. 7243), the appeal of Gertrude Burke is granted. The present proceedings are remanded to the Examiner for another hearing, after notice, and the preparation by the Examiner of a further decision in this matter.

EDMUND T. FRITZ,
Acting Solicitor.

DUNCAN MILLER

A-27624

Decided July 14, 1958

Rules of Practice: Appeals: Statement of Grounds

Where an appellant states merely that there has been an erroneous interpretation of the law, without pointing out wherein the decision appealed from is believed to be erroneous, the appellant has failed to state reasons for his appeal, as required by the rules of practice, and the appeal will be dismissed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by Duncan Miller from a decision of the Acting Director, Bureau of Land Management, dated December 3, 1957, which affirmed the action of the manager of the land office at Los Angeles, California, in rejecting two offers (Los Angeles 0137444 and 0137445) filed by Mr. Miller to lease deposits of

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oil and gas in certain land in California, under the provisions of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., sec. 351 *et seq.*). The Acting Director found that the land is set apart for naval purposes and is thus excluded from the operation of the Mineral Leasing Act for Acquired Lands.

The Director notified Mr. Miller of his right of appeal to the Secretary; that any appeal must be supported by a statement of reasons; and that strict compliance with the rules of practice as set forth in 43 CFR, Part 221, would be required. An information sheet, containing the current rules, was attached.

On January 14, 1958, Mr. Miller filed a document entitled "Notice of Appeal and Statement of Reasons for Appeal" which states:

Appeal is hereby made for the above listed cases. A ten dollar fee is enclosed, attached herewith.

Appellant contends that there has been an erroneous interpretation of the law and that these lands are properly subject to lease under the acquired land law.

The statement does not point out wherein the appellant believes the Acting Director erred in his interpretation of the law or why he believes the deposits are subject to lease under the Mineral Leasing Act for Acquired Lands. It contains no specification of error and is, in reality, nothing more than a request that the decision be reviewed to determine whether it contains error.

Such a statement does not meet the requirements of the rules of practice. Those rules require that a statement of reasons for an appeal must be filed. Under the current rules, the statement may accompany the appeal but, if it does not, it must be filed within 30 days after the notice of appeal is filed. 43 CFR, 1954 Rev., 221.32 and 221.33 (Supp.).¹ The rules also provide for the summary dismissal of an appeal "If the statement of the reasons for the appeal is not included in the notice of appeal and is not filed within the time required." 43 CFR, 1954 Rev., 221.98 (a) (Supp.).

Prior to 1952, there was no requirement that a statement of reasons for the appeal be filed in connection with an appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management. 43 CFR, 1949 ed., 221.73-221.79. However, a revision of the rules was made on May 16, 1952 (17 F. R. 4708), whereby an aggrieved person desiring to appeal to the Secretary was required to set forth in his notice of appeal "clearly and concisely the grounds upon which the appellant contends that the Director's decision is erroneous" (43 CFR, 1954 Rev., 221.75 (b)), and appeals which did not meet this requirement were subject to summary dismissal (43 CFR, 1954 Rev., 221.75 (d)). Under that revision of the rules,

¹ These rules were amended effective as of March 22, 1958 (23 F. R. 1930), but without change so far as the issue involved in this decision is concerned.

appeals were consistently dismissed for failure to state any grounds for the appeal.² In *Ross H. Hemphill*, A-27065 (November 23, 1954), the notice of appeal stated: "As permitted by law, applicant appeals from said decision as being contrary to applicable law and regulations, and hereby notifies you of his appeal therefrom." It was held that such a statement obviously does not set forth the grounds upon which the appellant contends the decision is erroneous and that since the notice of appeal did not comply with the requirement of the regulation, the appeal was defective and would be dismissed.

Effective May 1, 1956 (21 F. R. 1860), the rules of practice were revised and the rule with respect to the filing of a statement of reasons for an appeal was relaxed to the extent that the statement of grounds need not be included in the notice of appeal but could be filed 30 days after the notice of appeal. That revision did not, of course, excuse an appellant from the burden cast upon him of pointing out wherein the decision appealed from was thought to be erroneous. It merely extended the time within which the appellant might file his statement of reasons in support of his appeal. Under that revision of the rules, appeals to the Secretary have been consistently dismissed where the appellant has not filed a statement of reasons in support of his appeal within the time required by the revised rules of practice.³

An appellant cannot, by a mere statement that there has been an erroneous interpretation of the law, avoid the duty to show affirmatively in what respect the decision appealed from is in error and thus escape the penalty provided for those who fail to file any statement whatsoever in support of their appeals. Nor can an appellant shift to the Department the burden of determining whether an error has been committed. *James L. Knight*, A-27374 (September 19, 1956). When an appellant attempts to do so, his appeal will be treated in

² See *Charles H. Kane*, A-26754 (April 23, 1953); *Frank I. Hyman*, A-26621 (July 22, 1953); *Vincent E. Kannally, Executor of the Estate of Cornelius M. Kannally, Deceased v. San Manuel Copper Corporation*, A-26707 (May 29, 1953); *Arthur L. Wingard et al., State of Nevada*, A-26977 (June 3, 1954); *Richard B. Weringer*, A-26912 (July 28, 1954); *Harry Frank Boyer*, A-27012 (June 29, 1954); *Consolidated Mines and Smelting Co., Ltd.*, A-27019 (July 23, 1954); *Frank Noriega*, A-26916 (August 3, 1954); *Reliance Coal & Coke Co.*, A-26902 (August 3, 1954); *Eureka Livestock Company*, A-27013 (August 6, 1954); *Grace T. Wilson et al.*, A-26991 (October 27, 1954); *Southern Idaho Broadcasting and Television Company, Wilfred L. Reiher*, A-27102 (November 2, 1954); *O. J. Bonnett*, A-27036 (February 11, 1955); *William C. Parson*, A-27089 (April 12, 1955); *Hector Aitchison*, A-27226 (November 21, 1955); *United States v. Heirs of John W. Stockton, Deceased*, A-27281 (May 4, 1956); *Patricia Sagers*, A-27310 (May 14, 1956); and *Constantine Androus et al.*, A-27351 (July 16, 1956).

³ See *Gerhard Evenson*, 63 I. D. 331 (1956); *George F. Hughes*, A-27395 (October 4, 1956); *Bernard Iriart*, A-27412 (November 13, 1956); *Daniel L. House et al.*, A-27419 (November 13, 1956); *R. O. Haubelt*, A-27406 (November 13, 1956); *James A. Canning, Richard C. Hill, Jr.*, A-27407 (February 7, 1957); *United States v. John E. and Bernice V. Peterson*, A-27448 (April 26, 1957); *Ray O. Bowersox*, A-27472 (May 27, 1957); *Matley Bros. et al.*, A-27486 (May 28, 1957); *William H. Pace*, A-27483 (June 20, 1957); *Charles L. Wallace et al.*, A-27506 (December 12, 1957); *Harvey S. Hale*, A-27631 (March 28, 1958); and *Paul Albrecht*, A-27656 (May 13, 1958).

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the same manner as are those appeals in which no statements of reasons are filed within the time permitted.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), Mr. Miller's appeal is dismissed.

EDMUND T. FRITZ,
Deputy Solicitor.

PATRICIA T. ZEBAL ET AL.

A-27616

Decided July 18, 1958

Railroad Grant Lands

After issuance of patent to a railroad for place lands under its land grant, title is vested in the railroad; the United States does not own the patented land and must reject offers to lease for oil and gas in such land.

Mineral Lands: Determination of Character of

The nonmineral character of public land is established by the inclusion of the land in a patent under a railroad land grant which excludes mineral lands and cannot be disturbed after issuance of the patent.

Patents of Public Lands: Reservations

The inclusion in a patent of railroad grant lands of an exception of all mineral lands "should any be found to exist" does not diminish the estate vested in the grantee upon discovery of minerals in the land since the issuance of the patent constitutes a conclusive determination by the United States of the nonmineral character of the land, and the exception is void.

Oil and Gas Leases: Applications

An application for a noncompetitive oil and gas lease of lands patented under a railroad land grant must be rejected because the United States does not own such lands or the mineral deposits in the lands.

Oil and Gas Leases: Lands Subject to

Lands improperly included in patents because of their known mineral character are not subject to oil and gas leases until the patents are canceled and the availability of the land for leasing is noted on the tract book.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Patricia T. Zebal, George P. Zebal, Wendell H. Clauson and Renee C. Clauson have appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management, dated December 13, 1957, which affirmed the decisions of the manager of the land office at Cheyenne, Wyoming, dated April 12 and April 15, 1957, rejecting their noncompetitive oil and gas lease offers, Wyoming 050891 through 050903, filed under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. V., sec. 226),

because the lands covered by such offers had been patented to the Union Pacific Railroad on February 11, 1903, without a reservation of oil and gas to the United States.

In filing their offers, the appellants alleged that under a decision of the Supreme Court of the United States dated April 8, 1957 (*United States v. Union Pacific Railroad Co.*, 353 U. S. 112), minerals under the lands included in the lease offers are owned by the United States and subject to the Mineral Leasing Act, as amended. On appeal to the Director, the appellants pointed out that the patents to the Union Pacific Railroad Company exclude and except all mineral lands, not including coal and iron lands, but submitted that the Bureau of Land Management should not attempt to determine the important legal question of the meaning of the exception. They indicated their desire to pursue their administrative remedy only in order to have standing in a Federal court and requested the Department to take such action as would allow them to appear as relators in an action to obtain a judicial determination of the issues involved. The Union Pacific Railroad Company had previously protested against the granting of oil and gas leases pursuant to the appellants' offers on the ground that the company is the owner in fee simple of the lands included in the offers, including all minerals and mineral rights, because the exception in the patent was null and void under the decision of the Secretary of the Interior dated December 10, 1903 (*Northern Pacific Railway Co.*, 32 L. D. 342), and the decision of the Supreme Court in *Burke v. Southern Pacific Railroad Company*, 234 U. S. 669 (1914).

Subsequently, in reply to the appellants' contentions on their appeals to the Director, the company moved that the appeals be dismissed for want of any reasons urged by the appellants for reversal of the manager's decisions and because of the appellants' expressed desire for no review by the Director. The company moved in the alternative for affirmance of the manager's decisions on the basis of the decision in *Burke v. Southern Pacific Railroad Company*, *supra*.

The Director denied the motion to dismiss but held that the manager was correct by virtue of the holdings of the courts in the *Burke* case and *Thomas v. Union Pacific Railroad Co.*, 139 F. Supp. 588 (D. C. Colo. 1956), *aff'd* 239 F. 2d 641 (10th Cir. 1956), distinguishing *United States v. Union Pacific Railroad Co.*, *supra*.

In their appeal to the Secretary, the appellants urge that the United States should attack the railroad patents under an exception recognized in the *Burke* case on the basis of fraud because there was no examination or investigation to determine the mineral or nonmineral character of the land at the time of the issuance of the patent. The railroad company has again urged that the appeals be dismissed because of the appellants' failure to state reasons why the lease offers should not have been rejected and because the appellants have re-

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quested relief outside the adjudicatory jurisdiction of the Secretary of the Interior and, in the alternative, that the Director's decision be affirmed as correct.

The lands in controversy appear to be place lands of the grant to the railroad outside the right-of-way for the railroad line, which right-of-way comprises a strip 200 feet in width on either side of the railroad where it passes over public lands and necessary grounds for stations and other facilities. The place lands consisted originally of 5 alternate sections of land per mile on each side of the railroad within 10 miles on each side of the line, but were enlarged on July 2, 1864, to include 10 sections per mile on each side of the road within 20 miles of the line (13 Stat. 356, 358). The railroad company met the conditions of the grant by building the railroad, and the patents which included the lands in controversy were issued on February 11, 1903.

Section 3 of the act granting the place lands to the Union Pacific Railroad Company expressly provided that—

* * * all mineral lands shall be excepted from the operation of this act. * * *. (12 Stat. 489, 492)

The patents of February 11, 1903, contained, apparently as a qualification of the grant of the lands identified by the legal description included therein, the following language:

Yet excluding and excepting from the transfer by these presents "All Mineral Lands", should any such be found to exist in the tracts described in the foregoing, but this exclusion and exception, according to the terms of the Statute, "shall not be construed to include coal and iron land."

This language is not peculiar to these patents. The Supreme Court observed in the *Burke* case that it "appears in all the patents issued from 1866 to 1904 under railroad land grants containing an exclusion of mineral lands" (234 U. S. at 694). And, presumably, it was intended to operate by diminishing or voiding the estate in lands vested in the grantee upon the subsequent discovery of mineral deposits in the lands identified by the patent. On December 10, 1903, however, the Secretary of the Interior, responding to a request from a railroad grantee that such exception be eliminated from patents issued under its land grant, reviewed the pertinent decisions of the Supreme Court and concluded that the issuance of a patent constitutes a conclusive determination of the nonmineral character of the land identified by the legal description contained therein and that an attempt to postpone the time of such determination beyond the date of patent or to divest the grantee of title recognized therein is ineffectual. *Northern Pacific Railway Co., supra*. The Secretary concluded with a direction that the General Land Office "in future, * * * exclude said excepting clause from all railroad land grant patents." (32 L. D. 342, 346.)

And, in the *Burke* case, the Court quoted with approval a portion of the following language of the Secretary of the Interior in *Courtright v. Wisconsin Central Railroad Co.*, 19 L. D. 410, 413 (1894):

* * * the exception in the patent "yet excepting and excluding all mineral lands, should any such be found to exist," cannot confer upon or reserve to the Department the power and authority to inquire into the character of the lands embraced in the patent. If it was the intention of the officers of the government to to [sic] leave as an open question the character of the lands embraced in the patent, then they acted without authority, for when patent issued, that was the end of the jurisdiction of the Department over the lands. The exception contained in the patent went beyond "giving expression to the intent of the statute," as construed by the supreme court, and added a restriction upon the grant which is not to be found in the granting act.

The Court also quoted with approval its earlier declarations in *Deffeback v. Hawke*, 115 U. S. 392, 406 (1885), and *Davis v. Weibbold*, 139 U. S. 507, 527-8 (1890), that land officers who are merely agents of the Government have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Very recently, in a case presenting the same question posed by this case, a Federal district court quoted approvingly from the *Burke* case at length and added:

The plaintiffs, in their brief filed herein, in opposition to the defendant's brief, state that the *Burke* opinion is as extinct as the Dodo Bird. That this is not a correct appraisal of the *Burke* case, and that the *Burke* case is still a living, breathing authority for principles set forth in the quoted portion therefrom, is evidenced from the opinion from Judge Pickett in *United States of America v. Union Pacific Railroad Company*, supra [230 F. 2d 690 (10th Cir., 1956)] decided February 24, 1956, in which the *Burke* case is either cited or quoted from with approval, three times. (*Thomas v. Union Pacific Railroad Company*, supra, at 595.)

Therefore, it is apparent that the effect of the patents concerned in this case is the same as if the exception had not been included. The United States is bound by the determination of the nonmineral character of the land which is described in the patents and has no reserved authority to determine the mineral or nonmineral character of the land over 55 years after issuance of the patents.

The appellants, however, claim that there was no investigation of the land for the purpose of determining its mineral or nonmineral character at the time the patents were issued. But they have offered nothing to support their allegation, and the company has denied any knowledge of what was actually done and indicated its supposition that the procedures utilized may have been similar to those described by the Supreme Court in the *Burke* case. It is not established that there are any oil or gas deposits in this land; the appellants merely wish to obtain leases for the purpose of doing exploratory drilling to determine whether or not there may be deposits of either or both of these minerals in the land.

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In his decision of December 10, 1903, the Secretary of the Interior indicated that, under a land grant, a railroad, having completed a portion of the road which entitled it to a patent of granted lands, was required to file in the local land office a list of the lands included in the grant which were known to be available for patent and its selections of lands to replace those not available. After careful comparison with the plats and records in that office, the lists and selections were forwarded to the General Land Office for a second careful examination, during which all tracts within a radius of six miles of any mineral entry, claim or location were eliminated therefrom. A supplemental list of the eliminated tracts was prepared and the railroad company was required to publish it for a period of 60 days. From such published list were eliminated all lands protested, contested or claimed to be more valuable for mineral than for agricultural purposes and hearings were ordered to determine the character of such lands. Lands not protested, contested or claimed as mineral were included in clear lists and certified to the Department for approval and, upon approval, were included in the patent issued. In the absence of evidence to the contrary, it may be presumed that the above-described procedure was followed in determining the lands to be included in the patents issued to the Union Pacific Railroad Company in 1903.

In the *Burke* case the title of the railroad to oil bearing lands was under collateral attack, but the Court also dealt at length with the position of the United States in regard to patented lands which have been determined to be nonmineral at the time of patent. The Court, in its lengthy discussion, demonstrated a keen awareness of the procedures used by the Government in processing public land patent rights to determine whether mineral land exclusions were applicable. Emphasis was directed to the procedural requirements of affidavits and certificates as well as regulations requiring that railroad grant lists "be carefully and critically examined by the Register and Receiver and mineral lands be excluded therefrom * * *." Also the Court pointed out that hearings were often heard in local land offices to determine the mineral character of the land listed, and appeals were not infrequently heard by the Secretary of the Interior. (*Burke v. Southern Pacific Railroad Co.*, *supra*, at 695.)

The Court's conclusion as to the effect of patenting railroad grant lands, even though they later prove to contain minerals, is succinctly stated in the following quotation:

The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert-land, timber and stone, and other public-land laws, and the settled course of decision in respect of all of them has been that the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues

it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. *Smelting Co. v. Kemp*, 104 U. S. 636, 641; *Steel v. Smelting Co.*, 106 U. S. 447; *Mawell Land Grant Case*, 121 U. S. 325, 379-381; *Heath v. Wallace*, 138 U. S. 573, 585; *Noble v. Union River Logging Railroad*, 147 U. S. 165, 174; *Burfenning v. Chicago, &c. Railway Co.*, 163 U. S. 321, 323. In this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such a distinction.

Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it. *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 313; *Diamond Coal Co. v. United States*, 233 U. S. 236, 239; *Germania Iron Co. v. United States*, 165 U. S. 379; *Duluth & Iron Range Railroad Co. v. Roy*, 173 U. S. 587, 590; *Hoofnagle v. Anderson*, 7 Wheat. 212, 214-5. (*Burke v. Southern Pacific Railroad Co.*, *supra*, at 691, 692.)

Inasmuch as the appellants have failed to establish any irregularity in the issuance of the patents or the perpetration of any fraud on the United States, there is no warrant at all for attempting to annul or void the patents at this time. *Sewell Thomas et al.*, A-27016, A-27106, A-27113 (December 22, 1954).

Appellants point to the recent case of *United States v. Union Pacific R. Co.*, 353 U. S. 112 (1957), as indicating the possible success of a direct attack on the title of the railroad. This decision involved the question whether the right-of-way grant to the railroad in section 2 of the same act of Congress carried with it a right to the minerals underlying the right-of-way. The decision, by a 5 to 3 vote, held that the United States retained the minerals in the right-of-way lands. The majority decision stressed the distinction between the section 3 land grants and the right-of-way grant in section 2. As a matter of fact, the majority opinion cited the *Burke* case with approval, as follows:

The system which Congress set up to effectuate its policy of reserving mineral resources in the alternate sections of public land granted by § 3 was by way of an administrative determination, prior to issuance of a patent, of the mineral or nonmineral character of the lands. Patents were not issued to land administratively determined to constitute mineral lands. And, the administrative determination was final. *Burke v. Southern Pacific R. Co.*, 234 U. S. 669. (*United States v. Union Pacific R. Co.*, *supra*, at 116).

It should also be noted that the dissenting justices, who viewed the right-of-way grant as carrying mineral rights, also cited the *Burke* case with approval. 353 U. S., at 133.

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In view of the foregoing I am unable to concur that the recent *Union Pacific* case holds out any reason to believe that the determinations of the land office in the granting of railroad land patents are any less final under the present state of the law than they were at the time of the *Burke* decision in 1914. In view of the language of the Court in that case, I would be most reluctant to recommend any action to forfeit the title of the Union Pacific Railroad unless there were "plain and convincing proof" that the patent was fraudulently issued or issued through a mere inadvertence. See 234 U. S., at 692.

In resolving this appeal, I am aware of the fact that the Union Pacific Railroad has alienated very substantial acreages of land granted to it under the pertinent statute. These lands are now held by farmers and others under deeds reserving mineral rights to the railroad. The railroad land grant statutes do not merely reserve mineral deposits in mineral lands, they *exclude* all mineral lands from the grants. Thus an attack on the railroad title may well jeopardize the titles of many other innocent parties as well. Furthermore, the exclusion of mineral lands from railroad grants is not unlike that affecting other public land statutes under which millions of acres of land have been vested. Appellants' position would unsettle titles in vast areas of the United States. No compelling considerations have been demonstrated to support such a holding.

Finally, even if it were necessary to conclude that the United States owns the lands within the grant to the Union Pacific Railroad Company by virtue of their mineral character and may institute legal action to compel annulment of the patents which it issued over 55 years ago, it would still be necessary to reject the appellants' offers to lease for, in such case, the land would not be available for leasing until the patents were canceled and the availability of the land noted on the tract books. *Sewell Thomas et al., supra*; see *Martin Judge*, 49 L. D. 171 (1922); *E. A. Vaughey*, 63 L. D. 85 (1956).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director, Bureau of Land Management, is affirmed.

ELMER F. BENNETT,
Solicitor.

GODFREY NORDMARK

A-27602

Decided July 21, 1958

Rules of Practice: Appeals: Standing to Appeal—Oil and Gas Leases:
Assignments or Transfers

Any assignors as well as assignees are parties in interest to a decision which vacates in part prior decisions approving their assignment of oil and gas

leases, and failure to include an assignor as a party in interest to such a decision by the Acting Director of the Bureau does not defeat the right of the assignor to appeal to the Secretary therefrom.

Rules of Practice: Appeals: Standing to Appeal—Administrative Practice

Where one who was not a party to a decision by the Acting Director of the Bureau of Land Management, but who should have been made a party to the decision, had notice of the decision and appealed therefrom to the Secretary, his appeal will be considered on its merits and a motion to dismiss the appeal because of the appellant's lack of standing as a party to the proceedings will be dismissed.

Oil and Gas Leases: Acquired Lands Leases—Conveyances: Interest Conveyed

Where the United States quitclaims to private persons the mineral rights (excepting and reserving only coal) in acquired lands on which oil and gas leases are outstanding and the quitclaim deed does not except or reserve to the United States any right or interest as lessor under the oil and gas leases, the Department retains no jurisdiction over the mineral interests covered by the leases and after execution and delivery of the deed, the grantees of the United States become the lessors of the oil and gas leaseholds.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Godfrey Nordmark has appealed to the Secretary of the Interior from a decision of November 22, 1957, by the Acting Director of the Bureau of Land Management regarding certain lands included in acquired lands oil and gas leases BLM-A-024802 and 024938 (N. Dak.) (30 U. S. C., 1952 ed., sec. 251 *et seq.*). The lands were under the administrative control of the Soil Conservation Service, Department of Agriculture, when the leases were issued. The Acting Director's decision held that the mineral rights in some of the lands covered by the leases, including the interest of the United States as lessor under the oil and gas leases, were conveyed by a quitclaim deed of December 31, 1952, from the United States by the Chief, Soil Conservation Service, Department of Agriculture, to H. A. and Gertrude B. Mackoff, and that the Mackoffs, as grantees of the United States, became the landlords of certain portions of these oil and gas leases. The Mackoffs filed a brief in support of the Acting Director's decision.

Lease BLM-A 024802 was issued as of March 1, 1952, to Ben E. Singer covering 1,280 acres of land, including the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 20, T. 142 N., R. 101 W., 5th P. M., North Dakota. Lease BLM-A 024938 was issued as of February 1, 1952, to Paul Blake covering 407.44 acres of land, including the N $\frac{1}{2}$ SE $\frac{1}{4}$ and lot 3, sec. 12, T. 142 N., R. 102 W., 5th P. M., North Dakota. The instant appeal involves only the tracts of land just described. In a decision of July 24, 1952, the manager approved the assignment, effective July 1, 1952, of both leases to Godfrey Nordmark. In decisions of July 14, 1955,

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the manager approved assignments, effective May 1, 1955, from Mr. Nordmark to the Midwest Oil Corporation and Fred Goodstein.

On September 12, 1955, H. A. Mackoff and Gertrude B. Mackoff filed protests with the manager of the Billings land office stating that the protestants had acquired the minerals in the above-described lands by quitclaim deed dated December 31, 1952, from the United States and requested the cancellation of the outstanding leases on these lands. The protests recited that the United States had exercised its rights to purchase the lands from the protestants under an option dated March 25, 1935, which option reserved all minerals to the grantor, but through mistake the warranty deed of December 21, 1936, by which the lands were conveyed to the United States, did not reserve the minerals to the grantor. Pursuant to the act of July 8, 1943, as amended by the act of March 3, 1952 (5 U. S. C., 1952 ed., sec. 567), the United States reconveyed the minerals in the land by quitclaim deed of December 31, 1952, recorded on January 27, 1953, in book 33 of Deeds, page 575, in the office of the Register of Deeds, Billings County, North Dakota.¹

The record contains a photostatic copy of the quitclaim deed of December 31, 1952, entered into between H. A. Mackoff and Gertrude B. Mackoff, husband and wife, of Stark County, North Dakota, grantees, and the United States, grantor, acting by and through the Chief, Soil Conservation Service, United States Department of Agriculture. The deed recites that the Chief, Soil Conservation Service, has found that title to certain lands, including the above-described lands in leases 024802 and 024938, was acquired from the grantees by warranty deed dated December 21, 1936; that title to certain mineral rights in the lands was acquired through mistake, error, or inadvertence and that no consideration was paid to the grantees for such rights; and that therefore the grantor does remise, release, and quitclaim unto the grantees the mineral rights in the described lands situated in Billings County, North Dakota, subject, however, to an exception and reservation of coal to the United States. The title of the United States to the surface of the lands was not affected by the deed.

In response to the protests, by separate decisions of September 13, 1955, the manager of the land office held lease 024802 null and void as to the above-described lands in sec. 20, and lease 024938 null and void as to the above-described lands in sec. 12. Midwest Oil Corporation and Fred Goodstein, assignees of the leases, the only parties named in the decisions of September 13, 1955, appealed to the Director from the decisions.

¹ The statute under which the quitclaim deed of December 31, 1952, was executed permits the Secretary of Agriculture to execute and deliver a quitclaim deed on behalf of the United States to persons entitled to land or an interest therein, where the United States acquired title, *inter alia*, through inadvertence or mistake.

On January 17, 1957, Midwest Oil Corporation and Fred Goodstein filed with the manager applications for a 5-year extension of leases 024802 and 024938 under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. V, sec. 226). In a decision of April 23, 1957, the manager extended lease 024938 as to all of the land included in the lease except the land above described in sec. 12. In a decision of April 30, 1957, by the acting manager, the extension of lease 024802 was approved as to all of the land covered therein except the land in sec. 20. The decisions approving the partial extension of the leases stated that an assignment from Fred Goodstein to Trigood Oil Company would not be processed until a final decision had been rendered on the appeal involving the lands in secs. 12 and 20.

The Acting Director's decision on the appeal of Midwest Oil Corporation and Fred Goodstein from the manager's decisions holding the leases null and void in part held that by virtue of the quitclaim deed of December 31, 1952, the United States lost jurisdiction over the minerals in the lands and H. A. Mackoff and Gertrude B. Mackoff became the landlords of the above-identified portions of the oil and gas leases here involved. The decision vacated the manager's decisions of July 14, 1955, insofar as they approved the assignments of the privately owned portions of leases 024802 and 024938 from Godfrey Nordmark to the Midwest Oil Corporation and Fred Goodstein; vacated the manager's decisions of September 13, 1955, declaring null and void the privately owned portions of the leases; and affirmed the manager's and acting manager's decisions of April 23 and April 30, 1957, insofar as they denied extensions of the privately owned portions of the leases here under consideration and suspended action on the request for approval of additional assignments of the leases.

The Acting Director's decision named Midwest Oil Corporation and Fred Goodstein, the appellants, and H. A. and Gertrude B. Mackoff, the protestants before the manager, as parties to the decision. Copies of the decision were sent to the original lessees and to their assignee, Mr. Godfrey Nordmark, the appellant in this proceeding. Mr. Nordmark served notice of his appeal from the Acting Director's decision on H. A. and Gertrude B. Mackoff, who filed a motion for dismissal of Mr. Nordmark's appeal and an answer in this proceeding.

The motion for dismissal of the appeal asserts that Mr. Nordmark is a stranger to the proceedings and is not entitled to appeal from the Acting Director's decision. Although the assertion may be technically correct ² because the Acting Director did not make Mr. Nordmark a

² 43 CFR, 1954 Rev., 221.31 (Supp.), the regulatory provision governing the right of appeal to the Secretary, provides that:

"Any party adversely affected may appeal to the Secretary of the Interior from a final decision of the Director, whether such final decision is on an appeal or is an original decision, except from such a decision which, prior to promulgation, has been approved by the Secretary. No appeal, however, may be taken from a decision of the Director affirming a decision of a subordinate official of the Bureau

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"party" to the decision of November 22, 1957, from which this appeal is taken, it is not a proper basis for dismissing this appeal. The Acting Director's decision, *inter alia*, vacated the manager's decisions of July 14, 1955, approving the assignments of these leases from Godfrey Nordmark to Midwest Oil Corporation and Fred Goodstein as to the lands here under consideration. In effect, this ruling held that Mr. Nordmark was the record titleholder of the leases when the title of the United States to the mineral interest in this land was quitclaimed to the Mackoffs who then became his landlords. This ruling plainly affected a right and interest of Mr. Nordmark as one of the parties to the assignments and he should have been made a party to the Acting Director's decision. The failure to make Mr. Nordmark a party to that decision is not a valid reason for dismissing his appeal. Although the case might be remanded to the Bureau with directions to amend the decision of November 22, 1957, by making Mr. Nordmark a party thereto after which his appeal to the Secretary would be considered, such a procedure would be pointless since Mr. Nordmark received actual notice of the decision and has taken an appeal from it. In the circumstances, the motion to dismiss is denied, and Mr. Nordmark's appeal will be considered on its merits.

In support of Mr. Nordmark's appeal it is argued that despite the quitclaim deed to the Mackoffs, the lands here under consideration remain subject to the leases; that the Mackoffs have no right to assert any interest in the mineral deposits underlying the lands until the outstanding leases, including such extensions as are authorized by law, have expired by operation of law or have terminated; and, in effect, that until termination of the leases the Department retains jurisdiction of these lands for all purposes.

The appellant's contentions ignore the fact that usually when an interest in real property is transferred subject to an outstanding lease, the grantee or transferee takes the interest of the transferor in the leasehold estate unless that interest is reserved or excepted from the transfer; and although a voluntary transfer of the reversion by the landlord neither terminates the leasehold estate nor deprives the tenant of his rights, the transferee becomes the landlord under the lease.³

in any case where the party adversely affected shall have failed to appeal from the decision of such official."

As Mr. Nordmark's assignments were not vacated by the manager's decisions of September 13, 1955, from which the appeal to the Director was taken by Midwest Oil Corporation and Fred Goodstein, Mr. Nordmark's appeal is not precluded by the provision of 221.31 prohibiting appeals from the Director's decision affirming a decision of a subordinate official of the Bureau in a case where the adversely affected party failed to appeal from the decision of such official.

³ Ordinarily a tenant is not deprived of his leasehold estate by the sale of the premises and upon a transfer of the reversion, the transferor ceases to be the landlord, the privity of estate between him and the tenant ceases, and he can no longer assert rights against the tenant based thereon, e. g., the right to rent accruing after the transfer of the reversion passes to the transferee. Tiffany, *The Law of Real Property*, Vol. I, sec. 116 (3d ed.);

In the instant case, the United States did not reserve or except from the operation of the conveyance its interest as lessor under these leases but quitclaimed to the Mackoffs all of the mineral interest of the United States in these lands, excepting only coal, so far as this record shows.⁴ The provision in section 4 of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., sec. 353) making any sale or conveyance of acquired lands subject to outstanding leases under the act appears to be a statement of what the rule of real property law would be as to the effect of a sale of leased premises in the absence of statute; and does not change the outcome in this case.

The conclusion of the Acting Director's decision that as a result of the quitclaim deed of December 31, 1952, the Mackoffs became the landlords of the above-identified portions of the oil and gas leases here under consideration is consistent with Solicitor's opinion M-36269 of March 24, 1955 (unreported), which considered certain effects of a sale by the Department of Agriculture (under a different statute from that here involved) of all acquired mineral interests of the United States where such interests were subject to an oil and gas lease issued under the Mineral Leasing Act for Acquired Lands. The opinion, without quoting the words of the conveyances made under the statute (7 U. S. C., 1952 ed., sec. 1033), indicates that the Government's interest in the lease of minerals was expressly quitclaimed and states that the rule, without exception, appears to be that where a tract of land containing a portion of the leased deposits is sold without the lessee's participating in any way, the lease continues as a single unit as to all of the land and the lessee's obligations under the lease, including

Thompson, *Commentaries on the Modern Law of Real Property*, Vol. III, sec. 1335; 32 *American Jurisprudence*, secs. 89, 96.

⁴In the brief on appeal to the Director (pp. 9-10), the then appellants stated that Mr. Earl A. Hendrickson, Chief, Regional Land Acquisition and Sales Division, Soil Conservation Service, Lincoln, Nebraska, instructed Mr. Lloyd S. Good, Range Manager, Dickinson, North Dakota, to advise the Mackoffs of the oil and gas leases when delivering the quitclaim deed. The brief then quotes the following letter from Mr. Good to Mr. Mackoff:

"Dickinson, North Dakota
January 21, 1953

"Mr. H. A. Mackoff,
Attorney-at-Law
Dickinson, North Dakota.

"Dear Mr. Mackoff:

"Attached you will find a Quit Claim Deed which conveys minerals back to you on certain tracts of land which the Government acquired from you. The deed does not cover all the minerals which you requested, but does cover the minerals which the Government believes were acquired through error. This deed should be recorded as soon as possible.

"The minerals have been leased by the Bureau of Land Management on the following: SW $\frac{1}{4}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ section 20, Twp. 142, Range 101 are included with other lands in an Oil and Gas Lease BLM-A-024802 issued to Ben E. Singer, effective March 1, 1952.

"Lot 3 and N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 12, Twp. 142, Range 102 are included with other lands in an Oil and Gas Lease BLM-A-024938 issued to Paul Blake, effective February 1, 1952.

"Very truly yours,
"Lloyd R. Good,
Range Manager."

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the obligation to drill and produce, remain unchanged. The opinion also holds that any sale of the minerals must be subject to all of the lessee's rights including the right to an extended term; that the lessee's obligation to pay royalty with respect to privately owned land is not governed by Federal law, but is governed by State law; and that since all of the rights of the United States are conveyed under the statute, including its rights as lessor, the United States has no voice in the disposal of the minerals and may not share in the royalties.

Inasmuch as the deed to the Mackoffs here under consideration did not except or reserve to the United States the lessor's interest under these leases but expressly quitclaimed the mineral interest of the United States in the lands, the conclusions of Solicitor's opinion M-36269, *supra*, are applicable in this case, and the appellant's assertions to the effect that this Department retained jurisdiction as lessor under the leases after the mineral interests were quitclaimed cannot be sustained. Accordingly, the Acting Director's decision that this Department had no jurisdiction over the mineral interests here involved after the effective date of the conveyance to the Mackoffs is correct, as are the related rulings vacating actions by the manager which were inconsistent with the conclusion that by reason of the quitclaim deed, the Mackoffs became landlords under these leases on the lands in controversy.

For the reasons discussed herein and pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

VALIDITY OF REGULATIONS RELATING TO OIL AND GAS LEASES ON WILDLIFE REFUGES, GAME RANGE AND COORDINATION LANDS

Mineral Leasing Act: Generally

The Secretary of the Interior is not authorized by law to effectuate the policies of the Mineral Leasing Acts so single mindedly that he is thereby equally required to ignore the objectives of the wildlife conservation laws.

Oil and Gas Leases: Discretion to Lease

The granting of oil and gas leases on Federal lands is a matter within the discretion of the Secretary of the Interior and regulations reasonably requiring lessees to prevent waste and protect property are valid.

Secretary of the Interior

Under the permissive language in the Mineral Leasing Act, consent to lease may be granted subject to appropriate conditions prescribed by the Secretary.

Wildlife Refuges and Projects

Administrative withdrawals of public lands for wildlife sanctuaries or refuges in connection with national and international programs are valid.

Withdrawals and Reservations: Generally

Withdrawals made under the Pickett Act must be within the bounds of a "public purpose," or one of the specified purposes, and the termination of such reservations depends either on an administrative or a congressional revocation.

M-36519

JULY 15, 1958.*

TO THE SECRETARY OF THE INTERIOR.

You have requested an informal memorandum opinion concerning your authority to issue the regulations of January 8, 1958,¹ which were designed to protect wildlife sanctuaries in granting oil and gas leases under the Mineral Lands Leasing Acts. It has been suggested that you lack statutory or other authority thus to protect the public interests by issuing these regulations assuring the preservation of wildlife areas for the purposes for which they were set aside or acquired. It has been suggested further that you lack authority to withdraw, by administrative action, areas of the public domain for wildlife conservation purposes. In my opinion, neither suggestion is well founded in the law.

1. THE REGULATIONS

Section 1 of the Mineral Leasing Act of February 20, 1920,² provides, with certain specifications and exceptions, that lands owned by the United States containing designated mineral deposits shall be subject to disposition. Your discretionary authority, as the Secretary of the Interior, in making such disposition stems primarily from section 17 of the act, as amended.³ It clearly states in permissive language⁴ that all lands subject to disposition under the act which are known or believed to contain oil and gas deposits "*may be leased* by the Secretary of the Interior." Further, you are authorized in section 32⁵ to prescribe necessary and proper rules and regulations and to do all things necessary to carry out and accomplish the purposes of the act. We will return to the subject of discretionary authority later.

It has been suggested that by reason of the exclusions in section 1⁶ the maxim *expressio unius est exclusio alterius* applies and limits

* Not in chronological order.

¹ 23 F. R. 227.

² 41 Stat. 437, as amended, 30 U. S. C., 1952 ed., sec. 181.

³ 30 U. S. C., 1952 ed., sec. 226.

⁴ *U. S. ex rel. Siegel v. Thoman*, 156 U. S. 353, 360 (1895), and *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 588 (1904).

⁵ 30 U. S. C., 1952 ed., sec. 189.

⁶ 30 U. S. C., 1952 ed., sec. 181.

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your authority. That maxim is subject to many safeguards and certainly cannot be properly invoked here. According to Sutherland,⁷ it requires great caution in its application, and in all cases is applicable only under certain conditions:

* * * As a tool of statutory interpretation the maxim is important only insofar as it is a syllogistic restatement that the courts will first look strictly to the literal language of the statute to determine legislative intent. And so, where the meaning of the statute is plainly expressed in its language, and if it does not involve an absurdity, contradiction, injustice, invade public policy, or if the statute is penal in nature or in derogation of the common law, a literal interpretation will prevail. Conversely, where an expanded interpretation will accomplish beneficial results, serve the purpose for which the statute was enacted, is a necessary incidental to a power or right, or is the established custom, usage or practice, the maxim will be refuted, and an expanded meaning given. *In all cases the numerous intrinsic and extrinsic aids of interpretation are of importance in ascertaining whether the maxim will prevail* [Italics supplied].

In this instance, any prescription of rules and regulations necessary to carry out the purposes of the Mineral Leasing Acts on wildlife sanctuaries inevitably involves other statutory programs and national commitments. See for examples:

1. Game Laws of May 25, 1900, 31 Stat. 187; 16 U. S. C., 1952 ed., sec. 701. See also 18 U. S. C., 1952 ed., secs. 41 *et seq.*
2. Game Birds Eggs Act of June 3, 1902, 32 Stat. 285; 16 U. S. C., 1952 ed., sec. 702.
3. Migratory Birds Act of March 4, 1913, 37 Stat. 847; 16 U. S. C., 1952 ed., sec. 673.
4. Kansas Game Preserve Act of June 22, 1916, 39 Stat. 233, and March 10, 1928, 45 Stat. 300.
5. Migratory Birds Treaty Act of July 3, 1918, 40 Stat. 755; 16 U. S. C., 1952 ed., secs. 703-711.
6. Migratory Birds Protection Proclamation of July 31, 1918, 40 Stat. 1812.
7. Ozark National Forest Game Refuge Act of February 28, 1925, 43 Stat. 1091; 16 U. S. C., 1952 ed., sec. 682.
8. Ozark National Game Refuge Proclamation, April 26, 1926, 44 Stat. 2611.
9. The Upper Mississippi Wild Life and Fish Refuge Act of June 7, 1924, 43 Stat. 650; 16 U. S. C., 1952 ed., secs. 721 *et seq.*
10. Fish Conservation Act of May 1, 1928, 45 Stat. 478.
11. Fish and Game Preserve Act (Idaho), December 15, 1928, 45 Stat. 1022.
12. Fish Culture Act, January 29, 1929, 45 Stat. 1142.

⁷ 2 Sutherland, *Statutes and Statutory Construction*, sec. 4917 (Horack ed. 1943).

13. Migratory Bird Conservation Act of February 18, 1929, 45 Stat. 1222; 16 U. S. C., 1952 ed., sec. 715-715r.
14. Migratory Bird Conservation Act of March 16, 1934, 48 Stat. 452; 16 U. S. C., 1952 ed., sec. 718-718h.
15. Wildlife Conservation Act of May 19, 1948, 62 Stat. 240; 16 U. S. C., 1952 ed., sec. 667b-667d.
16. Fish Restoration and Management Projects Act of August 9, 1950, 64 Stat. 430; 16 U. S. C., 1952 ed., secs. 777 *et seq.*
17. Migratory Birds Conservation Act of July 30, 1956, 70 Stat. 722; 16 U. S. C., 1952 ed., secs. 718a *et seq.*
18. Fish and Wildlife Act of August 8, 1956, 70 Stat. 1119; 16 U. S. C., 1952 ed., secs. 742a *et seq.*

In connection with the above statutory programs it is of interest to note that the Criminal Code specifically states that:

*Whoever, except in compliance with rules and regulations promulgated by authority of law, hunts, traps, captures, willfully disturbs or kills any bird, fish, or wild animal of any kind whatever, or takes or destroys the eggs or nest of any such bird or fish, on any lands or waters which are set apart or reserved as sanctuaries, refuges or breeding grounds for such birds, fish, or animals under any law of the United States or willfully injures, molests, or destroys any property of the United States on any such lands or waters, shall be fined not more than \$500 or imprisoned not more than six months, or both. [Italics supplied.]*⁸

Even if the Mineral Leasing Acts, taken together were to be considered in the nature of a positive mandate to grant leases rather than as a grant of permissive authority to you as Secretary to take certain action in your discretion,⁹ careful consideration to the applicability of those wildlife conservation laws nevertheless would be essential. As a policy matter, you necessarily should adhere to the general proposition that you were not by law authorized to effectuate so single mindedly the policies of the Mineral Leasing Acts, that thereby you equally were required to ignore the congressional objectives of the above wildlife conservation laws.¹⁰

* * * Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.¹¹

That principle, in my opinion, should control in this instance.

However, returning to the subject of your leasing authority, it is pertinent also to note that the Supreme Court has clearly indicated that the public interest is a factor to be considered in mineral leasing itself.¹²

⁸ 18 U. S. C., 1952 ed., sec. 41 as enacted into positive law June 25, 1948, 62 Stat. 686. Based largely on Conservation Act of January 24, 1905, 33 Stat. 614.

⁹ *United States v. Wilbur*, 283 U. S. 414 (1931).

¹⁰ In this connection see *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31 (1942).

¹¹ *Ibid.*, p. 47.

¹² *Chapman v. Sheridan-Wyoming Coal Co., Inc.*, 338 U. S. 621 (1950).

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"The Mineral Lands Leasing Acts," it has said, "confer broad powers on the Secretary as leasing agent for the Government. We find nothing that expressly prevents him from taking into consideration whether a public interest will be served or injured by opening a particular mine. But we find no grant of authority to create a private contract right that would override his continuing duty to be governed by the public interest in deciding to lease or withhold leases."¹³

"* * * [W]e find no authority to freeze this public interest into an irrevocable private property right."¹⁴

In connection with noncompetitive oil and gas leases issued earlier on lands within wildlife refuges, Assistant Secretary C. Girard Davidson has held:

* * * With regard to such [wildlife refuge] lands [within the Bitter Lake Unit Area]. * * * the purpose of the Fish and Wildlife Service in protecting the wildlife of the refuge would be effectuated by the protection secured by the terms of the unit agreement prohibiting drilling on those lands except with the consent, in writing, of this Department and by the provisions, hereinafter set forth, to be included in this lease * * *. The lands of the Unit Area, including the Wildlife Refuge lands within the Unit Area, have been designated as comprising a block of land regarded as logically subject to development under the unitization provisions of the Mineral Leasing Act. The drilling of a test well or wells will be on land outside the refuge. No drilling will be authorized within the refuge area at this time. Should oil or gas be discovered on unitized land outside the refuge and drilling within the refuge prove to be necessary and advisable for the conservation of natural resources, no drilling will be permitted within the refuge even then except *with the consent in writing of the head of the agency having jurisdiction over the said refuge and under such terms and conditions as he may deem necessary for the protection of the refuge.* The above provision in the unit agreement and the hereinafter-mentioned provisions of the lease will adequately protect the Wildlife Refuge from the devastation of its prime function, while at the same time making possible the adequate unitization and development of the oil pool [italics supplied].¹⁵

Speaking generally of administrative power to condition consent, Mr. Chief Justice Hughes said in *James, State Tax Commissioner v. Dravo Contracting Co.*, 302 U. S. 134, 148 (1937):

Normally, where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation. Thus, as a State may not be sued without its consent and "permission is altogether voluntary," it follows "that it may prescribe the terms and conditions on which it consents to be sued." *Beers v. Arkansas*, 20 How. 527, 529; *Smith v. Reeves*, 178 U. S. 436, 441, 442. Treaties of the United States are to be made with the advice and consent of the Senate, but it is familiar practice for the Senate to accompany the exercise of this authority with reservations. Hyde, *International Law*, Vol. 2, § 519. The Constitution provides that no State without

¹³ Pp. 627-628.

¹⁴ P. 629.

¹⁵ 59 I. D. 309, 311 (1946).

the consent of Congress shall enter into a compact with another State. It can hardly be doubted that in giving consent Congress may impose conditions. See *Arizona v. California*, 292 U. S. 341, 345.

This Department has taken a similar position consistently in asserting the power to condition its administrative consent. As stated earlier by the Assistant Secretary:

The power of the Secretary of the Interior to establish this legal relationship [between the United States and the lessees] flows from the fact that assignments may be made only with his consent, and "where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation." *James v. Dravo Contracting Co.*, 302 U. S. 134, 148. That is to say, the power to grant or withhold consent includes the power to impose reasonable conditions in giving consent. 36 Op. Atty. Gen. 29; 56 I. D. 174, 183; cf. *Montana Eastern Pipeline Company*, 55 I. D. 189, 191. The establishment of the legal relationship resulting from the approved assignment is such a condition and therefore valid.¹⁶

Since the granting of oil and gas leases on Federal lands therefore is a matter within your discretion,¹⁷ any regulation you adopt reasonably requiring lessees to conform to certain specifications and instructions designed to prevent waste and protect property certainly will be sustained by the courts.¹⁸

2. AUTHORITY TO WITHDRAW LANDS

The exercise of administrative discretion, whether based on implied authority or on specific statutory authority, often can be a source of argument. However, there are well-founded principles to guide an executive or an administrative officer in the exercise of such discretion. Long ago the Supreme Court noted that we have no officers in this Government from the President down to the most subordinate agent who does not hold office under the law, with prescribed duties and limited authority.¹⁹ However, "a practical knowledge of the action of any one of the great departments of the government," that Court also has said, "must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be

¹⁶ 58 I. D. 712, 715 (1944). In this connection, see also *Sunderland v. United States*, 286 U. S. 226, 235 (1924).

¹⁷ *United States ex rel. Jordan v. Ickes*, 55 F. Supp. 875 (1943); *aff'd* 143 F. 2d 152, cert. denied, 320 U. S. 801 and 323 U. S. 759.

¹⁸ *United States v. Grimaud*, 220 U. S. 506, 516 (1911), *Forbes v. United States*, 36 F. Supp. 131 (1940), *aff'd* 125 F. 2d 404 (1942), *aff'd* 127 F. 2d 862 (1942).

¹⁹ *The Floyd Acceptances*, 74 U. S. (7 Wall.) 666, 676-677 (1868).

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marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. * * *²⁰

In this instance, however, statutory authority is not lacking. Section 1 of the Pickett Act of June 25, 1910,²¹ authorized the President " * * at any time in his discretion, temporarily [to] withdraw from settlement, location, sale or entry any of the public lands of the United States including * * * Alaska and reserve the same for water-power sites, irrigation, classification of lands, *or other public purposes to be specified in the orders of withdrawals*, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." [Italics supplied.]

Three observations are pertinent at this point in connection with that language: (1) The reservation authority is not limitless, but must be exercised within the bounds of a "public purpose," or one of the specified purposes; (2) the temporal extent of any such reservation for a public purpose depends either on an administrative or a congressional revocation; (3) within general authority of law such as the McCormack Act of August 8, 1950,²² the President can vest and has vested this statutory authority to withdraw or reserve lands in the Secretary of the Interior.²³

On the general authority of the Secretary of the Interior to withdraw public lands, Acting Solicitor Cohen once said:

The function of administering the public lands of the United States is conferred on the Secretary of the Interior by statute. Title 5, sec. 485, United States Code, provides:

"The Secretary of the Interior is charged with the supervision of public business relating to the following subjects [and agencies]:

* * * [13] [P]ublic lands, including mines."

Also see Title 43, secs. 2 and 1201, United States Code. This statutory authorization includes authority over "the acquisition of rights in the public lands and the general care of these lands." *Cameron v. United States*, 252 U. S. 450, 459; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324; *Knight v. U. S. Land Association*, 142 U. S. 161, 177, 181; *United States v. Schurz*, 102 U. S. 378, 395.

* * * * *

The courts have consistently adopted the view that the Secretary of the Interior is authorized to withdraw public lands. *Northern Pac. Ry. Co. v. Wismer*, 246 U. S. 283, 287; *Chicago, Mi. & St. P. Ry. v. United States*, 244 U. S. 351, 356, 357; *United States v. Morrison*, 240 U. S. 192, 212; *Wood v. Beach*, 156 U. S. 548, 550; *Riley v. Welles*, 154 U. S. 578; *Bullard v. Des Moines Railroad*, 122 U. S. 167, 172; *Wolsey v. Chapman*, 101 U. S. 755, 768-770; *Wolcott v. Des Moines*, 5 Wall. 681, 688; *Wilbur v. United States*, 46 F. (2d) 217, 219 (aff'd, 283 U. S. 414); *Stockley v. United States*, 271 Fed. 632 (rev'd on other grounds, 260 U. S. 532).

²⁰ *United States v. Macdaniel*, 32 U. S. (7 Pet.) 1, 14-15 (1833).

²¹ 36 Stat. 847; 43 U. S. C., 1952 ed., sec. 141.

²² 64 Stat. 419, now re-enacted and codified as 3 U. S. C., 1952 ed., secs. 301 *et seq.*

²³ Executive Order No. 10355, May 26, 1952 (17 F. R. 4831).

All of these cases involved the validity of orders of withdrawal issued by the Secretary of the Interior. In each case the withdrawal was held valid on the ground that the act of the Secretary of the Interior was, in legal contemplation, the act of the President. This has also been the position previously taken by this Department. (*Daniel P. Nolting*, A-17134, January 28, 1933.)²⁴

The Acting Solicitor went further even insisting “* * * The President * * * has inherent power, apart from these statutes,²⁵ to make permanent reservations of public lands for Federal uses. Opinion of Attorney General to Secretary of the Interior, dated June 4, 1941 * * *”²⁶ While it is unnecessary for you to claim or rely on any “inherent power” theory in this instance, it is of interest to note that the existence of such authority has been asserted in prior administrations.²⁷

3. CONGRESSIONAL HEARINGS

It has been suggested that the Public Lands Subcommittee of the Senate Committee on Interior and Insular Affairs may desire to hold hearings on this matter. The Legislative Reorganization Act of August 2, 1946,²⁸ “As an exercise of the rule-making power of the Senate,” has vested in the Committee legislative jurisdiction over this subject.²⁹ Further, the legislative oversight provision (sec. 136) of that act authorizes that Committee to conduct such studies and hearings and to propose such changes in the laws as it may deem necessary or proper. These provisions are not substantive law but simply procedural rules and committee jurisdictional authorizations of the Senate.

Being simply procedural matters, they do not disparage your authority to exercise your judgment, as an officer in the Executive branch, and promulgate regulations effectuating both statutory programs and protecting the public interest in each.

4. CONCLUSION

Withdrawals of public lands for national wildlife sanctuaries or refuges representing administrative action are only a part of essential national and international programs. They are, as I have shown, reasonable in scope and sound in law.

Harmonizing the objectives of the wildlife conservation program and the Mineral Leasing Act, in my opinion, represents effective administration as well as sound application of law.

ELMER F. BENNETT,
Solicitor.

²⁴ 57 I. D. 331, 332-333 (1941).

²⁵ Referring to the act of June 25, 1910, 36 Stat. 847; 43 U. S. C., 1952 ed., secs. 141-143, as amended by the act of August 24, 1912, 37 Stat. 497.

²⁶ *Ibid.*, p. 332.

²⁷ Cf. *Steel Seizure Case, Youngstown v. Sawyer*, 343 U. S. 579 (1952).

²⁸ 60 Stat. 812.

²⁹ See sections 101 and 102.

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**RENTAL RATES FOR PREFERENCE RIGHT OIL AND GAS LEASES OR
LEASE OFFERS EMBRACING LANDS BENEATH NONTIDAL NAVI-
GABLE WATERS IN ALASKA UNDER THE PROVISIONS OF THE
ACT OF JULY 3, 1958 (72 STAT. 322)**

Oil and Gas Leases: Rentals—Alaska: Oil and Gas Leases

The rental rates applicable to lands added to noncompetitive oil and gas leases, applications, or offers in Alaska upon the exercise of the preference right granted under the act of July 3, 1958 (72 Stat. 322), to have included therein the lands beneath nontidal navigable waters embraced therein are the same as those applicable to the other lands covered by such lease, application, or offer. Upon the addition of such lands to outstanding leases pursuant to the act all the other terms and provisions thereof, including the lease term and anniversary date, are thereafter applicable to the preference right acreage.

M-36523

AUGUST 1, 1958.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have requested my opinion on four questions involving interpretation of the act of July 3, 1958 (72 Stat. 322), providing for the leasing of oil and gas deposits in lands beneath nontidal navigable waters in Alaska. These questions concern the rental rates applicable to noncompetitive leases outstanding on the date of approval of the act, and to offers for such leases pending on May 3, 1958, to the extent that the lessees or offerors exercise the preference right granted under section 6 of the act to have included in their leases or offers the lands beneath nontidal navigable waters within the boundaries thereof. Your questions are stated as follows:

(1) What rate of rental shall be charged to the holders of leases which were outstanding prior to July 3, 1958 who exercise their preference right to have the lands beneath the nontidal navigable waters included in the lease? Shall it be at the same rental rate prescribed in the outstanding lease or must it be at the new rate prescribed by the Act?

(2) Similarly, what rate of rental shall be charged to lease applicants or offerors whose applications were filed prior to and which were pending on May 3, 1958, if they exercise their preference right to include the lands beneath the nontidal navigable waters in the offer or in the lease which issues pursuant thereto?

(3) If at the time a lessee elects to exercise his preference right, the lease is within its second or third year term, will rental for the additional lands become due and payable at such time or will the rental be waived until the lease enters the fourth or fifth year of its term?

(4) When does the increased rental become due and payable? Is it on the granting of the application whether that date be the anniversary date of the lease or otherwise? Or, does the increased rental become due and payable on the anniversary date subsequent to the exercise of the preference right granted by section 6?

In granting the preference right referred to above, the right is stated in section 6 of the act to be "a preference right to have included

in such [outstanding] lease (or [pending] application or offer) such lands beneath nontidal navigable waters in the Territory of Alaska." [Italics added.] In section 10 the act provides that annual lease rentals for nonstructure lands in Alaska shall be identical with those prescribed for such leases covering similar lands in the States except that leases issued pursuant to applications or offers filed prior to and pending on May 3, 1958, shall require payment of 25 cents per acre for the first lease year.

It seems clear from this express language of section 6 that the preference right granted thereunder is not a right to a separate lease covering the lands beneath any nontidal navigable waters embraced within the outstanding lease or pending offer, but, rather, is a *right to have such lands included in and covered by* the then outstanding lease or pending offer. The Senate Committee which considered the bill has removed any doubt from this conclusion by their action in amending H. R. 8054, 85th Cong., to delete language providing for the issuance of separate leases to such preference-right lands and substituting the provision, as enacted, under which the preference right is stated as the right to have those lands *included* in the outstanding lease or pending offer. In its report (S. Rept. 1720, 85th Cong.) the Committee explained this amendment on page 5, as follows:

An additional amendment to section 6 will result in including the lands subject to preference rights within the lease to which the preference right attaches rather than issuing a new lease for the preferred lands. *In this way the lease block can be administered without having different expiration dates and possibly different lease provisions within the same block.* [Italics added.]

Section 10 of the act expressly provides that a rental rate of 25 cents per acre is applicable to all leases issued pursuant to lease applications or offers pending on May 3, 1958. Upon the filing of timely applications, lands beneath nontidal navigable waters embraced therein are covered by and included in the pending application or offer, and thereafter the rights and obligations (including the rental obligation) of the applicant or offeror as to such added lands are the same as those applicable to all other lands included therein. Should a lease issue pursuant to such a pending lease application or offer *prior* to the filing of a preference-right application, the additional lands may be added to the lease and would then be subject to its rental provisions as issued, provided the preference right is timely asserted within the year allowed by section 6 of the act.

As to outstanding leases, it is apparent that Congress did not intend that a less favorable rental provision should apply to preference-right lands added thereto under section 6 than to such lands added to lease applications or offers pending on May 3, 1958. Moreover, it is axiomatic that if the preference-right lands are to be *included* in the outstanding lease as specifically provided in section 6, the rights and

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obligations of the lessee with respect to the lands added thereto will be the same as those applicable to all other lands in the lease. In other words, all the provisions of the outstanding lease, including its prescribed rental rates, will necessarily be applicable to the newly added acreage. This is the interpretation adopted by the Senate Committee in the above-quoted statement in its report that the amendment would relieve the lease block from having to be administered under differing lease provisions.

Since upon the addition of preference-right lands to a lease outstanding on the date of the act the added lands become subject to all the terms and provisions thereof by the operation of section 6, the remaining term and anniversary date of the outstanding lease are thereafter applicable to the preference-right acreage. In this connection it should be noted that the above statement of the Senate Committee further interprets the amendatory language of section 6 of the act as allowing the administration of lease blocks without having different expiration dates within the same block.

From this it also follows that rentals for the acreage added to an outstanding lease must necessarily be based on the same lease year (extending from one anniversary date to another) that applies to the other lands included in the lease. By the terms of the lease the rental obligation is on a lease year basis, and must be paid in advance of each anniversary date. It must therefore be concluded that the rental obligation for acreage added to an outstanding lease during a lease year does not arise until the anniversary date next following the exercise of the preference right granted under section 6 of the act.

In summary, it is my opinion that the questions raised in your memorandum must be answered as follows:

(1) The holders of leases outstanding on the date of the act who exercise their preference right to have lands beneath the nontidal navigable waters embraced therein included in the lease, are chargeable for the additional acreage at the rental rate prescribed in the outstanding lease.

(2) Lease applicants or offerors whose applications or offers were pending on May 3, 1958, who similarly exercise their preference right under section 6 of the act, are chargeable for the additional acreage at the rental rate applicable to the other lands included in the application or offer, or in the lease issued pursuant thereto.

(3) If at the time a lessee elects to exercise his preference right, the lease is in the second or third year of its term no rentals for the additional lands become due and payable until such date as rentals for the other lands included therein become due and payable.

(4) Rentals for the acreage added to an outstanding lease through the exercise of the preference right granted under section 6 become

due and payable on the anniversary date next following the exercise of the preference right by the lessee.

ELMER F. BENNETT,
Solicitor.

FRANCO WESTERN OIL COMPANY ET AL.

A-27607

Decided August 11, 1958.

Rules of Practice: Appeals: Statement of Grounds.

Where an appellant states merely that there has been an erroneous interpretation of the law and regulations, without specifying in what manner either the law or the regulations may have been erroneously construed, the appellant has failed to state reasons for his appeal, as required by the rules of practice, and the appeal will be dismissed.

Oil and Gas Leases: Assignments or Transfers

Regardless of when approval is given to an assignment of a portion of an oil and gas lease, the assignment, when approved, is effective from the first day of the lease month following the date of its filing in the proper land office.

Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions

For leases to become segregated through assignment, and thus entitled to the extension authorized for segregated leases, an assignment must be filed when there is at least one lease month remaining in the term of the lease. A partial assignment filed during the last month of the lease term cannot become effective to segregate the lease and to entitle the segregated portions to any extension.

Humble Oil & Refining Company, 64 I. D. 5 (1957), distinguished.

Associate Solicitor's Opinion M-36443 (June 4, 1957), overruled in part.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

These are three separate appeals to the Secretary of the Interior by Franco Western Oil Company, Duncan Miller, and Raymond J. Hansen from a decision of the Director, Bureau of Land Management, dated November 27, 1957, in which the Director affirmed the rejection by the manager of the Los Angeles land office, on August 22, 1957, of the appellants' offers, simultaneously filed on July 1, 1957, for oil and gas leases on the SE $\frac{1}{4}$ sec. 3, T. 11 N., R. 24 W., S. B. M., California, under the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. V, sec. 226), on the ground that the land was embraced in an outstanding oil and gas lease at the time the offers were filed.

A 5-year noncompetitive oil and gas lease, Los Angeles 087429, was issued to L. N. Hagood for the SE $\frac{1}{4}$ sec. 3 as of July 1, 1947, and the

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lease was extended for 5 years, through June 30, 1957, under the provisions of section 17 of the Mineral Leasing Act, as amended. On June 17, 1957, an assignment of the lease, insofar as it covered the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 3, by Mr. Hagood to the Savoy Petroleum Corporation was filed with the Los Angeles land office. The assignment was approved on June 28, 1957, the assigned portion being designated Los Angeles 087429-A. In approving the assignment, the acting manager held that the lease was extended for 2 years from July 1, 1957.

The Director, relying particularly on an opinion (M-36443) dated June 4, 1957 (unreported), from the Associate Solicitor, Division of Public Lands, to the Chief, Conservation Division, Geological Survey, held that the partial assignment from Hagood to the Savoy Petroleum Corporation effectively served to extend the base lease as well as the assigned portion thereof for a period of 2 years and so long thereafter as oil or gas is produced in paying quantities and that therefore the appellants' lease offers, filed on July 1, 1957, when the land applied for was embraced in a valid existing lease, were properly rejected.

Two of the appellants, Franco Western Oil Company and Raymond J. Hansen, contend that the Hagood lease expired on June 30, 1957, before the assignment of a portion thereof could have taken effect; that the ineffective assignment could not have extended the lease; and that, therefore, the land was open to filing on July 1, 1957, when their offers Los Angeles 015730 and 015740 were filed.

The third appellant, Duncan Miller, in his "Notice of Appeal and Statement of Reasons for Appeal," states merely that "Appellant contends that there has been an erroneous interpretation of the law and regulations" without specifying in what manner either the law or the regulations may have been erroneously construed.

The Department has recently had occasion to consider a statement similar to the above submitted in connection with an appeal to the Secretary by Mr. Miller in another case. There it was held that such a statement, which does not point out wherein the decision appealed from is believed to be erroneous, does not comply with the rules of practice (43 CFR, 1954 Rev., Part 221 (Supp.)), and that the appellant, having failed to state reasons for his appeal, must suffer the dismissal thereof. *Duncan Miller*, 65 I. D. 290 (1958). Accordingly, Mr. Miller's appeal will be dismissed.

We turn now to the question whether the assignment extended the Hagood lease.

Section 30 (a) of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. V, sec. 187a), under which the assignment of a portion of the Hagood lease was made, provides in pertinent part:

* * * any oil or gas lease * * * may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secre-

tary * * * and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, * * *. Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed. * * * Upon approval of any assignment or sublease, the assignee or sublessee shall be bound by the terms of the lease to the same extent as if such assignee or sublessee were the original lessee * * *. Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this Act. The segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities.

The section permits the assignment of portions of oil and gas leases which are in their 5-year extended term by virtue of section 17 of the Act. It provides that the segregated leases of undeveloped lands resulting from such assignments shall continue in full force and effect for 2 years and so long thereafter as oil or gas is produced in paying quantities.

This latter provision, however, does not mean that the assignment of a part of such a lease automatically results in the term of the base lease, absent production, being extended for 2 years beyond what would, in the absence of the assignment, be the expiration date of that lease. It means, rather, that if the base lease has less than 2 years to run the normal expiration date will be extended for such period of time as will assure the holders of the segregated leases a full 2-year period within which to obtain production. Thus, if such a lease were to be assigned in part during, say, the sixth year of the lease, the terms of the segregated leases resulting from the assignment would not be extended under this provision because the base lease from which the assignment was made would, at the time of the segregation, have more than 2 full years to run. On the other hand, if such a lease were, by assignment, to be segregated in, say, the third month of the tenth year, the segregated leases would run, absent production, for 2 years from the segregation. This would result in the base lease receiving an extension of 1 year and 3 months beyond the date on which it would otherwise have terminated, absent production. Solicitor's opinions M-36278, 62 I. D. 216 (1955); M-36398, 64 I. D. 135 (1956); and M-36464, 64 I. D. 309 (1957).

The section imposes no limit on when assignments may be made. The question remains, however, whether an assignment of part of the acreage included in a lease of undeveloped lands filed in the last month

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of the extended term of the lease operates to segregate and extend that lease for an additional 2 years.

Section 30 (a) provides that assignments may be made "subject to final approval by the Secretary" and that an assignment "shall take effect as of the first day of the lease month following the date of filing of the assignment" in the proper land office. While the assignor remains liable for all obligations under the lease until approval of the assignment and the assignee cannot be held liable under the lease until approval is given, nevertheless the assignment, if it is approved, takes effect on a day certain. The approval of the assignment may be given during the month in which the assignment is filed, as was done in the present case, or the approval may be delayed for months as happens in many cases due to various circumstances. However, regardless of when the approval is given, the assignment, when approved, is effective from the first day of the lease month following the date of filing thereof. The Secretary (or his delegate) cannot, by approving an assignment in the month in which it is filed, change the effective date of the assignment. The first day of the lease month following the filing of an assignment is the earliest date upon which the assignment can take effect. *Albert C. Massa et al.*, 62 I. D. 339 (1955).

While the section provides that any partial assignment of any lease shall segregate the assigned and retained portions thereof, that provision must be read with the other language therein to mean, not that the assignment itself shall segregate the lands held under lease, but that the assigned and retained portions of the base lease shall become separate leases on the effective date of the assignment, provided the assignment is ultimately approved.

For the leases to become segregated, and thus be entitled to the extension provided for in the last sentence of the section, an assignment must have been filed while there is at least one full "lease month" remaining in the term of the lease. Otherwise there is no "first day of the lease month following the date of filing" upon which the assignment can take effect. Thus where the expiration date of a lease covering undeveloped lands is the last day of the month in which an assignment of a portion thereof is filed, there is no "first day of the lease month following the date of filing" upon which the assignment can take effect. In such a situation the lease will have terminated before the assignment can become effective and thus the assigned and retained portions of the base lease never ripen into segregated leases.

While the Department held, in *Humble Oil & Refining Company*, 64 I. D. 5 (1957), that a relinquishment of an oil and gas lease, "effective as of the date of its filing" under section 30 (b) of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. V,

sec. 187b), was effective from the first instant of the day upon which it was filed and terminated the lease as of the first moment of that day, that decision is no authority for the proposition that an assignment which, under section 30 (a) of the act, cannot become effective during the term of the lease will extend the lease because "the last moment of the last day of the lease term would be instantaneous with the first moment of the effective date of the assignment."

The *Humble* case was concerned with events which took place on the same *day*. That case called for the application of the rule that in computing time a day is to be considered as an indivisible unit or period of time, which has its beginning coincident with the first moment of the day (86 *C. J. S.*, Time § 16), and it was held that a relinquishment filed on the day the annual rental under an oil and gas lease became due had the effect of terminating the lease *eo instanti* as of the first moment of that day and that, therefore, no advance rental accrued as of that day.

The rule for computing time also requires that every day and every part of that day be considered, in contemplation of law, to be one day before the first moment of the next day, although the elapsed time is infinitesimal, and that if an act is to be performed after a certain day it cannot be performed until the whole of that day has elapsed. 86 *C. J. S.*, Time § 16.

Under this rule, the Hagood lease cannot be considered to have been extended by the assignment. The opinion of the Associate Solicitor of June 4, 1957, *supra*, insofar as that opinion stated that a partial assignment of a noncompetitive oil and gas lease filed and approved on the last day of the extended 5-year term of the lease would effectively extend the terms of the segregated portions of the lease, must therefore be and is overruled.

It is held that the Hagood lease terminated on June 30, 1957; that the assignment of a portion thereof to the Savoy Petroleum Corporation never took effect; and that the offers of Franco Western Oil Company and Raymond J. Hansen should not have been rejected on the ground that the SE $\frac{1}{4}$ sec. 3, T. 11 N., R. 24 W., S. B. M., California, was, on July 1, 1957, embraced in an outstanding oil and gas lease.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the appeal of Duncan Miller is dismissed and the case is remanded to the Bureau of Land Management for appropriate action on the offers of Franco Western Oil Company and Raymond J. Hansen.

EDMUND T. FRITZ,
Deputy Solicitor.

*August 11, 1958***APPEAL OF FAIRBANKS, MORSE & CO.****IBCA-146***Decided August 11, 1958***Contracts: Damages: Liquidated Damages—Contracts: Interpretation**

A contract for the delivery of pumping equipment for irrigation purposes, which expressly states that liquidated damages will be assessed for each day of delay beyond the time for shipment specified in the contract, and which contains other expressions indicative of an intent to impose liquidated damages for any delay beyond the specified shipment date, but which describes the contemplated possible losses as being crop and other losses resulting from "a delay in the installation of the equipment," is to be interpreted as imposing liquidated damages for each day by which shipment is later than the specified shipment date, even though the equipment is received before it is actually needed for installation.

Contracts: Damages: Liquidated Damages—Contracts: Acts of Government

A provision imposing liquidated damages for delay in shipment, contained in a contract for the delivery of pumping equipment to be used for irrigation purposes, is not rendered unenforceable as a penalty merely because the Government after the making of the contract defers the construction of the pumping station in which the equipment is to be installed, or merely because the Government informs the contractor of this deferment prior to the shipment date specified in the contract, or merely because favorable rainfall conditions avert the crop losses contemplated when the contract was made, so that no harm results from the delay in shipment.

Contracts: Delays of Contractor—Contracts: Unforeseeable Causes

Under the standard form "excusable causes of delay" provision, a delay in delivering equipment is not excusable on the ground that the contractor learned from Government sources of a deferment of the construction of the plant in which the equipment was to be installed, and assumed that by reason of such deferment the Government would not require it to make delivery within the time specified in the contract.

BOARD OF CONTRACT APPEALS

This disposes of a timely appeal from a decision of the contracting officer, dated December 16, 1957, assessing liquidated damages in the amount of \$1,300 for the late delivery of two electric motors under a contract with the Bureau of Indian Affairs, dated August 13, 1956.

The contract provided for the furnishing of two complete pumping units, each of which was to include one electric motor and one pump, together with control equipment, for installation in a pumping station on the Modoc Point Irrigation Project, Klamath Indian Reservation. It was on U. S. Standard Form 33 (Nov. 1949 ed.) and incorporated the General Provisions of U. S. Standard Form 32 (Nov. 1949 ed.). The estimated contract price, inclusive of an allowance for the services of an Erecting Engineer, was \$23,839.

Under the terms of the contract the pumping units were to be delivered to the Government at Chiloquin, Oregon, and were to be shipped from the contractor's shipping point, which in the case of the electric motors was Beloit, Wisconsin, within a period of 200 days. Notice to proceed was given by a letter dated August 14, 1956, which was received by appellant on August 16. Appellant was thereupon informed, by a letter dated August 29, that the period of 200 days for shipment of the pumping units had started on August 17, and would expire on March 4, 1957.

The record indicates that the two motors were shipped from Beloit, Wisconsin, on March 30, 1957, which was 26 days after the end of the specified period, and arrived at Chiloquin, Oregon, on April 5. It further appears that both of the motors were received in a condition which indicated that they may have sustained internal damage while in transit, and that one of them had sustained visible external damage. Arrangements were made with appellant and with the carrier who had transported the motors, pursuant to which the motors were taken to Portland, Oregon, for examination and testing and for the repair, without expense to the Government, of any damage. This having been done, the motors were returned by appellant on or about May 17 to the Modoc Point Project, where they were placed in storage by the Government. They remained in storage for the better part of three months while awaiting installation in the pumping station for which they had been ordered. Installation was effected on August 14, 1957, by another contractor for the Government.

The pumps themselves, unlike the motors, were shipped promptly and arrived about 5 weeks before the end of the specified 200 days. They were installed at the same time as the motors.

It is apparent from the face of the contract that the pumping units were to be installed in a pumping station that was yet to be built, and the design of which had not yet been finished in all particulars. The contract required appellant to provide the services of an Erecting Engineer for supervision of the installation, but stated that the work of installation, as well as the work of constructing the station, would be performed by the Government, or by other contractors for it. The contract drawings revealed that installation of the pumping units would necessarily have to follow the construction of some parts of the station, and would necessarily have to precede the construction of other parts. The significance of coordination of the delivery of the pumping units with the progress of work on the station was, therefore, manifest.

At the time when the contract with appellant was made, no contract for the construction of the pumping station had yet been let. Bids for the construction contract were opened on September 28, 1956, but

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were found to be considerably higher than the engineer's estimate. The Bureau of Indian Affairs thereupon rejected all the bids, redesigned the station in an effort to reduce its cost to a figure within the Bureau's budget limit, and readvertised for bids on the basis of the revised plans. The second set of bids was scheduled for opening on April 3, 1957, and resulted in a contract being awarded to the successful bidder under date of May 2. Construction work was authorized to be begun during the first part of May, or, in other words, about 1 month after the initial arrival of the motors at the irrigation project. The pumping station was completed and the construction work accepted on May 19 of the following year. As of June 18, 1958, the station had not yet been put to use.

The contracting officer found that appellant was chargeable with liquidated damages at the rate of \$50 per day for a period of 26 days. Appellant does not dispute the fact that it was 26 days late in shipping the electric motors. It contends, however, that this delay in delivering the motors did not, as things ultimately turned out, cause any actual damages, and that, therefore, it should not be charged with liquidated damages. The contracting officer dismissed this contention on the ground that he had no authority to waive the assessment of liquidated damages for such a reason.

Analysis of the contractor's objections to the assessment of liquidated damages indicates that they present, in reality, three distinct issues. These will be determined on the basis of the documents of record, since neither party has requested a hearing for the purpose of taking testimony.

The first issue is whether a failure to ship the pumping equipment within the specified period of 200 days, or a failure to ship such equipment in sufficient time to admit of its being installed without delaying the construction work, or a failure in both of these particulars, is the event upon which the contract conditions the obligation to pay liquidated damages.

The bid provisions of the contract, in the form in which they were filled out by appellant, state that the pumping units are to be furnished "F. O. B. destination Chiloquin, Oregon," that "200 days" is the "Number Calendar Days Guaranteed for completion and delivery of equipment at Chiloquin, Oregon," and that "Pomona, Calif. and Beloit, Wisconsin" are the "Bidder's Shipping Point."

Paragraph 6 of the specifications, as amended by addendum No. 1, reads, in pertinent part, as follows:

LIQUIDATED DAMAGES—DELIVERY PERIOD. Liquidated damages will be assessed the Contractor in the amount of fifty dollars (\$50.00) per day for each calendar day of delay beyond the time for completion and delivery of equipment stated in the contract, subject to provisions of Clause 11, Default, Standard Form 32 (Gen-

eral Provisions). Delivery shall be interpreted as time of delivery at the Contractor's shipping point, substantiated by receipted Bill of Lading.¹

Paragraph 4 of the specifications, in pertinent part, reads as follows:

EVALUATION OF BIDS. All bids received will be evaluated on the basis of the following five factors:

(d) *Time of delivery.* The equipment specified hereunder is urgently needed and time of delivery is important. All bids stating and guaranteeing a time of delivery at the Contractor's shipping point, within a period of Two Hundred (200) calendar days or less from date of receipt of written notice of approval of contract will be considered on an equal basis. Because of possible loss of crops and other factors, it is estimated that the loss or damage to the Government resulting from a delay in the installation of the equipment will be Fifty Dollars (\$50.00) per pumping unit per calendar day. Therefore, bids will be evaluated for determining award of contract by adding to the bid price the amount of Fifty Dollars (\$50.00) per pumping unit per calendar day for each calendar day of delivery in excess of Two Hundred (200) calendar days.

The intent of these provisions, in the opinion of the Board, is to impose liquidated damages if any major component of the pumping units is not delivered at the shipping point within 200 days from the receipt of the notice to proceed, rather than to impose liquidated damages merely if the delivery is put off to so late a date as to delay the progress of work on the pumping station. The only language in the contract which might give some semblance of support to the latter construction is the sentence in paragraph 4 that speaks of "a delay in the installation of the equipment." That paragraph, however, is directed primarily to the subject of evaluation of bids, whereas paragraph 6, which is couched in terms of the time of delivery, is the one that purports to impose the obligation of paying liquidated damages. Moreover, even in paragraph 4 mention is made several times of the time of delivery, and the criterion there prescribed for evaluating bids is the number of days within which the bidder is willing to guarantee shipment, not some factor pertaining to installation as such.

The identification in paragraph 4 of the harm against which the Government desired to be safeguarded as being a "possible loss of crops and other factors," resulting from "a delay in the installation of the equipment," is not inconsistent with the imposition by paragraph 6 of liquidated damages in the event of a failure to deliver within the specified 200 days. It is clear that the ultimate objective which the Bureau of Indian Affairs had in mind when it contracted for the pumping units was the provision of an additional water sup-

¹ This sentence originally read: "Delivery shall be interpreted as meaning receipt of all equipment at Chiloquin, Oregon." It was changed to its present form by addendum No. 1.

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ply for the benefit of the water users of the irrigation project, in the absence of which crops might be lost and other harm sustained. This objective necessarily could not be attained until the pumps, together with the motors to operate them, had been installed, but the installation, of course, could not be effected until the pumps and motors had been delivered. Not only was each of these steps essential in attaining the ultimate objective, but each was interdependent on the other, for installation without delivery would have been impossible, and delivery without installation would have provided no water and avoided no crop losses. Since, as between the two steps, installation was the one that would be nearer in point of time to the realization of the ultimate goal, it was natural that installation should be mentioned in describing the nature of the harm that might be sustained if that goal was not timely realized, but since delivery was a necessary prerequisite to installation, it was equally natural that a failure to make delivery within the time guaranteed by the contractor should be fixed as the event that was to make the latter responsible for indemnifying the Government against such potential harm.

The contracting officer, we consider, rightly interpreted the contract as meaning that liquidated damages were to be charged if the pumps were not shipped within 200 days from the date of the notice to proceed, irrespective of whether installation of the equipment was actually delayed by reason of a failure to ship the pumps within that time.²

The second issue presented is whether any harm actually occurred by reason of appellant's failure to ship the motors on time and, if not, whether the absence of harm caused the liquidated damage provision of the contract to be a penalty and, therefore, precluded the contracting officer from enforcing that provision.

Paragraph 4 of the specifications, as has been mentioned, indicates that harm might be suffered by the Government through "possible loss of crops and other factors." In drafting this language the Bureau of Indian Affairs had in mind the possibility that the project water users could suffer substantial crop losses during the 1957 growing season if the pumping station was not ready for operation by that time. The pumping station, however, was not completed to a point

² Paragraph 4, it will be noted, fixes the estimated amount of the harm at \$50 "per pumping unit" per calendar day, and thereby imports that in the event of a delay with respect to both units, liquidated damages would be chargeable in the aggregate amount of \$100 per calendar day. Paragraph 6, on the other hand, does not incorporate the phrase "per pumping unit" or any equivalent expression. The contracting officer considered that this omission created an ambiguity in the contract, which should be resolved in favor of appellant. Accordingly, notwithstanding that the delay which actually happened involved the motors for both of the units, he assessed liquidated damages at the rate of \$50, rather than \$100, for each of the 26 days of delay. The Department Counsel has not questioned the correctness of this aspect of the contracting officer's decision, and the Board perceives no reason why it should do so.

where it could have been used until the 1958 growing season, but, nevertheless, the anticipated crop losses did not occur. The lateness in the completion of the station was due, as has been seen, primarily, if not wholly, to the redesigning of the station by the Bureau, rather than to any delay by appellant in connection with either the shipment or the subsequent repair of the pumps. The apparent reason why crop losses were not experienced during the 1957 season was the occurrence of favorable weather conditions which produced sufficient rain for growing crops and thereby obviated the need for obtaining supplemental water by pumping. Whether the 1957 season would turn out to be one of ample or deficient natural precipitation was, of course, an event that could not be known during the preceding summer when the equipment contract was bid upon and let. The statements of the contracting officer to the effect that the lack of need for supplemental water was an unexpected development are not contravened by appellant.

The contract itself does not reveal what are the "other factors" of loss or damage to which reference is made in paragraph 4. The contracting officer states, however, that one of these factors was the anticipated cost to the Government of handling complaints from the water users should they have needed during the 1957 season irrigation water which the Government could not then furnish; and that another was the possibility of a claim for damages for delay being asserted against the Government by the contractor for the construction of the station should his work have been held up because of unavailability of the pumping equipment. The first of these possible consequences of a delay in shipment of the equipment did not materialize because the water users did not need during the 1957 season the additional water supply to be provided by the pumping station; and the second likewise did not materialize because by the time the construction contractor was ready to install the equipment the pumps and the motors were both on hand.

Nevertheless, it is not possible for the Board to find, on the basis of the present record, that the delay in delivery of the motors caused no damage at all to the Government. There are many ways in which such a delay could have brought about substantial harm. For example, the record shows that the bids for the construction contract were scheduled for opening on April 3, 1957, and must, therefore, have been computed and submitted during the period immediately preceding that date. But this was also the very period during which the delay in delivery of the motors was taking place. The motors should have been shipped by March 4 at the latest, but, instead, they were not shipped until March 30 and were not received until April 5. It is entirely conceivable that the successful bidder on the construction job

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included in its bid a cost factor for possible delays in the installation of the pumping units which it would not have included had all of the components arrived at the irrigation project prior to the computation or submission of its bid. A prospective bidder on a construction job which involves, or is dependent upon, the installation of equipment to be furnished by others has good reason to take account of the possibility that such equipment may be slow in arriving or for other reasons may not be available when needed, that this may add to the costs of the job in a variety of ways, and that such added costs may not be compensable under the construction contract. And in estimating the extent of the risks inherent in this possibility, it would not be strange if equipment that was merely on order was regarded as involving a higher hazard than equipment that was actually on hand. In the instant case there is nothing to show that the delay in shipping the motors did, as a matter of fact, result in increasing the price which the Government had to pay for the construction job, but, on the other hand, there is nothing to negative the possibility that it may have increased that price.

That there is an advantage to the Government, as well as to a construction contractor, in scheduling equipment deliveries in advance of installation needs, rather than on a "hand to mouth" basis, is in this case pointedly illustrated by the facts that the motors were received in a damaged condition and that more than a month elapsed before they were repaired. Irrespective of how the damage occurred, and whose was the responsibility to rectify it, installation of the motors was dependent upon their being in a serviceable condition. Here the damage seems to have been minor, and the period between delivery and installation was long, with the result that the repairs were completed well in advance of the time when the motors were needed. But had the damage been more extensive, necessitating perhaps replacement of the motors, or had the time for installation followed more closely the specified delivery date, as it presumably would have if the pumping station had not been redesigned, it is quite possible that the 26 days of delay in shipping the motors would have been the cause of an equivalent delay in their installation.

The principles of law that govern the enforceability of a provision for liquidated damages have been summarized by the Supreme Court in the following words:

Today the law does not look with disfavor upon "liquidated damages" provisions in contracts. When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced. They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. And the fact that the damages suffered are shown to be less than the damages

contracted for is not fatal. These provisions are to be judged as of the time of making the contract. (Citations omitted.)³

The liquidated damage provision here in issue appears on its face to meet this test, and the appellant has shown no facts that call for a contrary conclusion. There is nothing in the record to suggest that at the time of the making of the contract the parties did not anticipate that crop losses or other harm would occur if the pumping station were not finished in time to provide water during the 1957 growing season, or that such an anticipation was not a reasonable forecast of what might be expected to happen in the light of the conditions that existed when the contract was made. That the anticipated crop losses did not actually occur appears to have been due to the purely fortuitous circumstance of good rainfall during the 1957 season. Nor is there anything in the record to suggest that the sum of \$50 per calendar day was an exorbitant measure of the harm that might reasonably have been expected had the season turned out to be one of poor rainfall. Should crop losses have been sustained, it seems obvious that many uncertainties and difficulties would have been involved in attempting to ascertain the precise extent to which the quantities and qualities of the crop yields were affected through the lack of the supplemental water supply intended to be provided by the pumping station, and the precise extent to which a particular delay in shipment of the pumping equipment was a substantial factor in bringing about this result. That the financial burden of crop losses would seemingly have fallen upon the water users rather than the Government is immaterial, since it is well settled that liquidated damage provisions in the contracts of public agencies need not be confined to indemnification for harm sustained by the agency in its corporate or proprietary capacity, but may encompass harm sustained by individual members of the community or group for the benefit of which the contract was made.⁴

It is true, indeed, that subsequent to the making of the contract for the pumping equipment the posture of affairs was materially altered. This is because the unexpectedly high prices bid for the construction contract and the consequent decision of the Government to redesign the pumping station so prolonged the initiation of the station construction as seemingly to have made it impossible to avert crop losses had the station been needed for service during the 1957 growing season. But the court of last resort has held that an even more radical change in conditions, namely, the impact of approaching peace upon the need for munitions that had been contracted for

³ *Priebe & Sons, Inc. v. United States*, 332 U. S. 407, 411-12 (1947). See also *Wise v. United States*, 249 U. S. 361 (1919); *Hughes Bros., Inc. v. United States*, 133 Ct. Cl. 108 (1955); *Schaar and Co.*, 16 Comp. Gen. 344 (1936); *Restatements, Contracts*, sec. 339 (1932).

⁴ See *Weathers Bros. Transfer Co., Inc. v. United States*, 109 Ct. Cl. 310 (1947); 5 Corbin, *Contracts* sec. 1062 (1951).

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when war was imminent, did not have the effect of turning into a penalty a liquidated damage provision which, at the time of its making, constituted a fair approximation of the harm that a breach of the contract might have been expected to cause if the change in conditions had not taken place.⁵

It is likewise true that appellant appears to have failed to make shipment within the specified 200 days simply because it had learned from the Bureau of Indian Affairs that the pumping units would not be installed until a later date, and concluded from this information that delivery within the specified number of days would not be required.⁶ However, as indicated in the preceding paragraph, neither the deferment of installation nor the events that led up to that deferment were themselves such circumstances as would make unenforceable the obligation of appellant to pay liquidation damages if the pumping equipment was not shipped within 200 days. This being so, it is hard to see how the mere fact that appellant knew of the impending deferment, or the mere fact that it obtained this knowledge from Government sources rather than through other means, could make the obligation unenforceable. The essence of what happened is simply that appellant drew from the developments of which it was told legal conclusions concerning the effect of those developments upon its contractual duties that were not warranted by the developments themselves.

Finally, it is also true that there is no proof of any harm at all having been sustained because of appellant's failure to ship the motors until 26 days after the specified date. The weight of authority, however, appears clearly to be that a liquidated damage provision in a contract governed by Federal law does not become unenforceable as a penalty merely because no loss is actually sustained, if, at the time of the making of the contract, it was reasonable to anticipate the possibility of a loss being sustained should the contract be breached.⁷ Even if the rule were otherwise,⁸ the record in the present case, as has been shown, does not negative the possibility that some loss was actually sustained by the Government. Were the absence of harm a defense to the liquidated damage provision, the burden of proving facts sufficient to show that there was no harm would be upon appellant.⁹

⁵ *United States v. Bethlehem Steel Co.*, 205 U. S. 105 (1907).

⁶ The pertinent portions of the record are set out in the discussion of the third issue.

⁷ *Weathers Bros. Transfer Co., Inc. v. United States*, 109 Ct. Cl. 310 (1947); *Pelton Water Wheel Co. v. United States*, 55 Ct. Cl. 31 (1919); *Graham and Collins Electric Co.*, 36 Comp. Gen. 143 (1956); *Federal Building Contractors*, 32 Comp. Gen. 67 (1952); *Virgin Islands Tourist Co.*, 18 Comp. Gen. 709 (1939); *Kulp Lumber Co.*, 17 Comp. Gen. 466 (1937); *Texas Centennial Central Exposition*, 16 Comp. Gen. 374 (1936).

⁸ See 5 Corbin, *Contracts* (1951), secs. 1062, 1063.

⁹ See *Dineen v. United States*, 109 Ct. Cl. 18 (1947); *Kohlman v. United States*, 63 Ct. Cl. 604 (1927); *McCann Construction Co.*, 61 I. D. 342 (1954); 5 Corbin, *Contracts*, secs. 1062, 1072 (1951).

All told, the facts of the present case are such as to bring it fairly within the application of the following comments, which were expressed by the Court of Claims in upholding the enforceability of a liquidated damage provision under circumstances where, as here, it was anticipated that delays would cause harm by holding up the work of other contractors:

The planned coordination of all work under the various contracts would make it difficult, if not impossible, to determine what actual damage might result if delays were encountered. The circumstances were therefore appropriate for the inclusion of a liquidated damage provision in the contract. The absence of proof of actual damage is not sufficient of itself to defeat the validity of a provision for liquidated damages. (Citations omitted.)¹⁰

The Board concludes, therefore, that the liquidated damage provision of the present contract was not a penalty, and, hence, was enforceable by the contracting officer.

The third issue to be determined is whether the delay in shipping the motors was caused by any circumstance made excusable by the contract. The reference in paragraph 6 of the specifications to clause 11 of the General Provisions, when read in the light of its context, can only mean that liquidated damages were not to be charged for those categories of delays for which, under clause 11, excess costs would not be chargeable in the event of a termination for default, that is, delays arising out of "causes beyond the control and without the fault or negligence of the Contractor," including, but not restricted to, acts of the Government and the other specific causes expressly mentioned in clause 11.

The contractor summarizes its explanation of why the motors were not shipped on time in the following words:

With regards to the reason for the delay in shipping the electric motors to the job twenty-six days late, we were well aware from talking with the Bureau of Indian Affairs that the installation would not be effected until the latter part of 1957 and due to other more urgent orders from other customers and the Government, we were under no particular pressure as far as we could see in completing this job as scheduled. Also the Bureau did not have any reason to call it to our attention but if they had, we quite possibly could have made the required delivery.

All of this more or less justifies the fact that nobody seemed to worry too much about actual shipment of these units according to the ascribed time since everyone realized they were not needed and were not holding up the construction schedule as this was almost the last equipment to go into the job.

The truth of this explanation is, at least, partially corroborated by the following remarks of the contracting officer:

The appellant Company was notified that there would be a delay in letting the construction contract during discussions in the winter of 1956 between Company and Government representatives, but we are aware of no action taken by

¹⁰ *Union Paving Company v. United States*, 126 Ct. Cl. 478, 490 (1953).

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the Government to lead the appellant to believe that the delay in delivery of the pumping equipment would no longer be important.

There is, however, nothing in either of these statements to suggest that appellant was prevented from meeting the contract delivery date by action on the part of the Government that impaired its ability to perform the contract on time, or by any other occurrence that was beyond its reasonable capacity to control. On the contrary, they indicate that the delay was due to appellant's purely voluntary decision not to try to meet the contract delivery date, and that this decision stemmed from appellant's purely voluntary assumption that, because of the deferment of the construction work, the Government would not seek to hold appellant to delivery by that date. It follows, and the Board finds, that the delay was not due to any cause made excusable by the contract.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer is affirmed.

THEODORE H. HAAS, *Chairman.*

HERBERT J. SLAUGHTER, *Member.*

MR. SEAGLE, dissenting:

I cannot agree with the conclusion reached in the majority opinion, since I believe that the provisions for liquidated damages are unenforceable.

The record presents a truly fantastic situation, so far as this problem is concerned. The contract for the construction of the pumping station had not even been let when the pumping equipment which was to be installed in the station arrived initially. The pumping station was not completed until more than a year later, and to this date the station has not yet been energized and put to use. It would certainly seem that under such circumstances liquidated damages should be imposed only if such action is inescapable.

Actually, the liquidated damages provisions reveal patent ambiguities with respect to both the amount of the damages and the occasion for imposing them, as the majority is compelled to admit. However, by a process of what seems to me dubious interpretation they proceed to resolve both ambiguities in favor of the Government's obtaining its "pound of flesh."

Provisions for liquidated damages were at first regarded with hostility by the courts which often declined to enforce them on the ground that they were actually penalties. Gradually the trend changed, and the courts began to favor such provisions. They said that where the

provisions were *clear*,¹¹ and reasonable, and actual damages were probable but difficult to estimate, they would enforce them. In recent cases, the Court of Claims has formulated the importance of clarity in terms of the canon of construction that provisions for liquidated damages must be narrowly construed.¹² If this is so, the meaning of such provisions should not be left to be determined by a process of implication.

It seems to me either that there is no satisfactory way of reconciling the provisions of paragraphs 4 and 6, or that if there is, effect should be given to the provisions of paragraph 4 rather than to paragraph 6. The effect of the first construction would be to eliminate the liquidated damages provision entirely, and that of the second construction would be to make the right to impose liquidated damages depend on delivery in time to make possible the actual installation of the equipment. As both the pumps and the motors were delivered long, long before they could be installed, liquidated damages should not have been imposed.

It does not seem to me that the arguments advanced in support of the construction of the majority are persuasive. It is of some significance that the relevant provisions have been somewhat distorted by being quoted in reverse order. The reverse order is no doubt intended to bolster the position and importance of paragraph 6, upon which is based the majority's view that delivery to the shipping point was of paramount importance. But this cannot be successfully established either by rearranging the order of the paragraphs, or by determining what would have been "natural" under the circumstances. It is, of course, obvious that delivery of the equipment had to precede necessarily its installation—this is as obvious as that one cannot make an omelet without eggs—but this proves exactly nothing with reference to the intent of the provisions. There have been contracts in which liquidated damages have been made to turn on *delivery*, or on *shipment*. But there have also been contracts in which liquidated damages have been made to turn on *installation*. Any one of the three types of contract is as "natural" as the others. The question is simply what the parties intended, and this is to be gathered primarily from their language. Now, as between paragraphs 4 and 6, it seems to me that the *basic* provision is the former. Its importance cannot be minimized by describing it as "directed primarily to the subject of evaluation of bids." It is precisely this that makes it basic; it contains the only sentence that clearly and unmistakably states that the

¹¹ The emphasis upon clarity is to be found in *Wise v. United States*, 249 U. S. 361 (1919) where the Court said: "When that intention (namely, to liquidate the damages) is clearly ascertainable from the writing, effect will be given to the provision * * *." (P. 365.) This has been frequently repeated. See, for instance, *Hughes Bros. Inc. v. United States*, 133 Ct. Cl. 108 (1955).

¹² See *Tobin v. United States*, 103 Ct. Cl. 480, 492 (1945) where the Court said: "It is a familiar doctrine that provisions for liquidated damages should be narrowly construed." See also *Climatic Rainwear Co., Inc.*, 115 Ct. Cl. 520, 558 (1950).

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damage to the Government will result not from the failure to ship the equipment on time but from "a delay in the installation of the equipment." On the other hand, paragraph 6 that follows it is merely the formal provision designed to carry out the *purpose* stated in paragraph 4, and it can be reconciled with paragraph 4 by interpreting paragraph 6 as requiring delivery to the contractor's shipping point in time for installation.

However, if I am wrong in my approach to the construction of these provisions and the right to impose liquidated damages depends on the date of shipment of the equipment, then the problem of the validity of the provisions is merely substituted for that of their construction. Paragraph 4 expressly declares that the damage to be anticipated from breach will result from "delay in the installation of the equipment." However much it might otherwise have been legitimate to argue that there is a relation between shipment and installation, this cannot be done in the face of an express provision attributing the damages to the delay arising from the latter. Moreover, there is no *necessary* relation between shipment and installation, as was pointedly demonstrated when the motors were shipped from the contractor's shipping point but, being fragile, sustained damage in shipment. The perils between shipment and actual delivery at the pumping station are obscured in the majority opinion by the use of the term "delivery" in the special sense in which it is defined in paragraph 6 of the specifications, namely delivery to the contractor's shipping point rather than actual delivery to the site of the pumping station. While the majority's usage is correct in terms of the special definition, it is not the same as delivery in fact.

It is obvious that if the right to impose liquidated damages depends on the failure to ship on time but the damage is not attributable to this cause that the provision for liquidated damages must be regarded as a penalty. However, even if delay in shipment was the evil to be avoided, the fact that there was no pumping station to which the equipment could be delivered even at the time the equipment contract was made, and the very prospect for a contract for the construction of the station was bleak, deprived the situation of that *immediacy or urgency* which could have justified a provision for liquidated damages.¹³ It seems to me perfectly idle to advance as a justification for such a provision the desirability of "coordinating" the equipment contract with a construction contract which was not yet executed, and which was not to be executed for a long time to come. And, the fact

¹³ These factors are stated to be relevant in determining the validity of a liquidated damages provision in a supply contract in 16 Comp. Gen. 344 (1936). Compare also *The Columbia*, 197 Fed. 661 (D. C. S. D. Ala. 1912), *aff'd*, 199 Fed. 990, holding that a vessel that had no charter could not stipulate for damages if repairs should be made late.

that the pumping station was in an area not always dependent on pumped water gave the situation even less urgency than it would otherwise have had. It was this no doubt that may also have been a factor in the rather leisurely manner in which the contracting agency proceeded to redesign the station and let a contract for its construction. It would hardly be contended that the Government could include a liquidated damages provision in a supply contract that called for the delivery of equipment for a special and exclusive purpose more than a year before that purpose could be accomplished.

Quite apart from such considerations, for a liquidated damages provision to be valid, the prospective damages must be unmeasurable, although real. A determined attempt is made in the majority opinion to paint a rather frightening picture of the damages that could possibly have been sustained but that were not actually suffered. The only real damage that could have been sustained either from failure to ship the pumping equipment on time or install it on time would have arisen from the partial or total loss of crops but the damages arising from such losses can be measured by agronomists with uncanny accuracy. The other damages, which are not mentioned in the contract but in a post-contract memorandum of the contracting officer seem to me wholly imaginary. That the Government's employees might have been annoyed by a few telephone calls from disgruntled water users is a rather trivial basis for liquidated damages. As for the possibility that the contractor who was to construct the pumping station might have sued the Government if the pumping equipment were not available when he was ready to install it, the delivery of the equipment to the contractor's shipping point would not necessarily guarantee its arrival. Moreover, as the contract for the construction of the pumping station is not before the Board, it does not seem to me to be possible to say whether the contractor would have had any right to sue the Government. As a matter of general law, it is well settled that the mere late delivery of materials entitles the contractor only to an extension of time for the performance of the contract.

In general, I do not challenge the correctness of the summary of the Federal law on unliquidated damages which is contained in the majority opinion. I do think, however, that it tends to exaggerate the degree of certainty that is characteristic of this law. As the Court of Claims said in a very recent case, *Hughes Bros. Inc. v. United States*, 133 Ct. Cl. 108, 112 (1955): "When are liquidated damages provisions enforceable and when are they construed as penalties? The cases on this question do not enunciate an absolutely consistent formula." It is also true that, while there are authorities which would seem to indicate that the Federal doctrine is that the fact that the Government suffered no perceptible loss is no justification for refusing to en-

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force a liquidated damages provision, in most cases this is merely a presumption that makes it unnecessary for the Government to offer proof. It is quite another proposition to insist that when it is clear that no damage was sustained by the Government liquidated damages should nevertheless be imposed.¹⁴ This is hardly a civilized doctrine that is likely to be accepted today.¹⁵ And, finally, while it is also true that liquidated damages provisions are to be judged as of the time of the making of the contract, it is no less true that hindsight is usually better than foresight, and that the situation as it existed at the time the contract was made may be better understood and judged in the light of subsequent events.¹⁶

In my view of the case, the third issue discussed in the majority opinion, is wholly irrelevant. If the provisions of the specifications, properly construed, required the delivery of the equipment only in time for its installation, there was no need for an extension of time to excuse delays. However, I should point out that the facts stated in the majority opinion in connection with this issue¹⁷ further indicate to me that the parties themselves put a practical construction on the delivery requirements of the specifications which would seem to be inconsistent with the majority view. The Bureau of Indian Affairs would not have informed the contractor that there had been delay in letting the contract for the construction of the pumping station unless the information would make a difference, and it would have made no difference if the contractor was required to deliver the pumping equipment whether or not the pumping station was in readiness to receive it. Moreover, subsequent events are consistent only with the assumption that the parties did not regard the mere shipment of the equipment as the important consideration. The contractor, who had the pump components available, shipped them in the latter part of January 1957, and they arrived at the pumping station on January

¹⁴ See, for instance, *Dewey Schmoll v. United States*, 91 Ct. Cl. 1, 28 (1940) where the court said: "Penalties are not favored by the courts when, as in the case before us, it does not appear that any actual damages have been sustained."

¹⁵ The so-called Federal doctrine is severely criticized in Corbin on Contracts in the very sections of his work cited in the majority opinion. It should be noted also that in the passage quoted in the majority opinion from *Priebe & Sons, Inc. v. United States*, the latest pronouncement of the land's highest tribunal on the subject of liquidated damages, the Court does not go so far as to say that a liquidated damages provision would be enforced even if it were clear that no actual damages had been sustained by the Government. The Court says simply that "the fact that the damages suffered are shown to be less than the damages contracted for is not fatal."

¹⁶ This point, too, is made in Corbin, *Contracts*, vol. 5, section 1063, pp. 304-05: "It is to be observed that hindsight is frequently better than foresight, and that, in passing judgment upon the honesty and genuineness of the pre-estimate made by the parties, the Court cannot help but be influenced by its knowledge of subsequent events."

¹⁷ These facts are correctly stated, except that I would not say that the contractor "learned" from the Bureau of Indian Affairs that the pumping units would not be installed until a later date. It was in fact notified of the delay by the Bureau. Moreover, this notification was not casual but in a "discussion" of the problem in the winter of 1956-57 when most of the performance time had elapsed.

28, 1957. Between this date and March 4, 1957, by which time the motors should have been delivered, five weeks elapsed. During these five weeks, a not inconsiderable period of time, the Government never so much as addressed a letter to the contractor to inquire why the motors had not also been shipped. If there had been any urgency about the motors, surely the Government would have reminded the contractor that unless he took steps to deliver the motors, he might incur liquidated damages. Indeed, such warnings are quite common in the administration of Government contracts. To me, the conclusion is irresistible that the parties did not regard the shipment of the pumping equipment at that time as possessing any importance.

WILLIAM SEAGLE, *Member.*

THE DREDGE CORPORATION

A-27429 (Supp.) *Decided August 14, 1958*

Solicitor, Department of the Interior—Secretary of the Interior

The Deputy Solicitor has been delegated authority to decide land appeals taken to the Secretary of the Interior and his decisions on such appeals are, in effect, decisions of the Secretary.

Mining Claims: Determination of Validity

The Department of the Interior has long recognized a distinction between two categories of cases involving the determination of validity of mining claims, the first category including cases where the validity of a claim turns on the legal effect to be given to facts of record (a question of law) and the second category consisting of cases where the validity of a claim depends upon the resolution of a factual issue (a question of fact). The Department has always held hearings in the second category of cases but not in the first category.

Administrative Procedure Act: Hearings—Mining Claims: Determination of Validity

The Administrative Procedure Act does not require the holding of hearings in mining cases where the facts are not in dispute and the validity of a claim presents solely a legal issue; therefore a hearing is not required before holding mining claims to be null and void because at the time they were located the lands were included in outstanding small-tract leases.

SUPPLEMENTAL DECISION

The Dredge Corporation has filed a petition that the Secretary of the Interior exercise his supervisory jurisdiction over a decision rendered by the Deputy Solicitor of this Department on September 23, 1957, in the matter of sixteen mining claims located by the petitioner in the vicinity of Las Vegas, Nevada (*The Dredge Corporation*, 64 I. D. 368 (1957)), and that the Secretary remand the matter to the

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local land office with instructions to hold hearings on all relevant matters.

Much of the argument contained in the petition is directed to matters not ruled on in the decision, e. g., the propriety of the classification of a large part of the land embraced in the claims for disposition under the Small Tract Act (43 U. S. C., 1952 ed., Supp. V, secs. 682a-682e) and the holding of the Director of the Bureau of Land Management that the classification of land for disposition under that act removed the land from the operation of the mining laws. Since those matters are outside the scope of the decision complained of, alleged errors of the Bureau of Land Management in ruling on such matters are not properly raised in an attack on the Deputy Solicitor's decision. While the Deputy Solicitor affirmed in part the decision of the Director, that affirmation was only of the ultimate conclusion reached by the Director that certain of the mining claims were null and void and was neither approval nor disapproval of reasons relied upon by the Director but not discussed in the Deputy Solicitor's decision.

One of the petitioner's major contentions is that the decision of September 23, 1957, is invalid because it was signed by the Deputy Solicitor and not by the Secretary, the Under Secretary, or one of the Assistant Secretaries. The answer to this argument is that the Deputy Solicitor's decision is, in effect, the decision of the Secretary. Under Reorganization Plan No. 3 of 1950, effective May 24, 1950 (15 F. R. 3174; 5 U. S. C., 1952 ed., p. 160), the Secretary was authorized to delegate to any officer, agency, or employee of the Department the performance of any function of the Secretary. Pursuant to that authority, the Secretary delegated to the Solicitor—

all the authority of the Secretary of the Interior with respect to the disposition of appeals to the Secretary from decisions of the Director of the Bureau of Land Management (or his delegates), and from decisions of the Director of the Geological Survey (or his delegates), in proceedings which relate to lands or interests in lands. (Sec. 23, Order No. 2509, amendment No. 16, July 18, 1952; 17 F. R. 6794.)

By amendment No. 20, a new section 3 was added to Order No. 2509 which authorized the Solicitor, "in writing, [to] redelegate * * * any authority delegated to him by the Secretary of the Interior, including the authority delegated by sections 20 through 28, inclusive, of this order." (19 F. R. 6312.)

Finally, by Solicitor's Regulation 4 of September 24, 1954, the Acting Solicitor delegated to the Deputy Solicitor "all of the authority of the Solicitor of the Department of the Interior, including the authority vested in the Solicitor by sections 20 through 28, inclusive, of Order No. 2509, as amended * * *." (19 F. R. 6312)

Therefore, in deciding the petitioner's appeal, the Deputy Solicitor acted strictly in accordance with authority delegated to him.

The petitioner's second major contention is that the Deputy Solicitor ignored the decision rendered by the Secretary in *United States v. Keith V. O'Leary et al.*, 63 I. D. 341 (1956). On the contrary, the decision under attack carefully distinguished the fact situation dealt with by the Secretary in the *O'Leary* case from the fact situation presented by the claims of the Dredge Corporation and the law applicable in each situation. It held that the law applicable to a situation such as that presented by the *O'Leary* case is not applicable to the fact situation presented by the *Dredge* case.

Perhaps one of the petitioner's chief difficulties lies in the fact that while the decision held the claims, in part, to be void *ab initio*, it also characterized the claims as being without validity. The petitioner seems to be under the impression that the validity of any mining location must be tested at a hearing, meaning a hearing at which the parties may appear and present evidence. Such is not the case. While certainly no mining claim has validity without a discovery (and where the Department attacks a mining claim on that issue the Department must, under the holding in the *O'Leary* case, afford the claimant a hearing in compliance with the provisions of the Administrative Procedure Act), factors other than discovery enter into the question of the validity of such a claim. These factors, depending on what they are, may or may not require that the claimant receive a hearing.

Almost from time immemorial the Department has observed a clear distinction between cases where the validity of a mining claim turns on the legal effect to be given to facts of record (a question of law) and cases where the validity of a claim depends upon the resolution of a factual issue (a question of fact). The second category of cases involves such issues as whether a discovery has been made or whether required expenditures for a patent have been made (in cases where claimants apply for a patent). Where there is a dispute on these latter issues, they can be resolved only upon the basis of evidence such as the testimony of witnesses and pertinent documents like assay reports. Such evidence can properly be received only at a hearing where witnesses are subject to cross-examination and observation as to demeanor. Consequently, in this category of cases, the Department has always ordered hearings to be held upon the basis of which a determination of the validity of the claims is made. See, for example, the early case of *Franklin Bush*, 2 L. D. 788 (1884).

Concurrently, however, while granting hearings in all cases involving factual issues, the Department has determined the validity of claims where only legal issues were involved without holding hearings. Thus, in *High Meeks*, 29 L. D. 456 (1900), a claim was in ef-

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fect held invalid where it was located within the Uncompahgre Indian reservation. In *The Dailey Clay Products Company*, 48 L. D. 429 (1921); *on rehearing*, 48 L. D. 431 (1922), a claim was determined to be void *ab initio* because located on forfeited Oregon and California Railroad grant lands which were chiefly valuable for waterpower sites at a time when such lands were not available for mining location. In *James C. Reed*, 50 L. D. 687 (1924), the Department declared illegal and void a mining claim located on land within a first-form reclamation withdrawal. In *Filtrol Company v. Brittan and Echart*, 51 L. D. 649 (1926), the Department held to be invalid *ab initio* a claim located on land included in an oil and gas permit. In *Coeur D'Alene Crescent Mining Company*, 53 I. D. 531 (1931), a claim located on land in a power-site withdrawal was held invalid. In all these cases, extending back 58 years, the Department held the claims involved to be invalid without holding a hearing.¹ In fact, in *United States v. United States Borax Company*, 58 I. D. 426 (1944), the Department, in holding a claim to be void from its inception because located on land included in an oil and gas permit, said:

As the facts supporting these conclusions are established by the official records of the General Land Office, a contest proceeding [i.e., a hearing] is unnecessary. (P. 444.)

From this recital of departmental cases, it is obvious that the more recent cases declaring claims to be void upon the basis of facts of record, without holding a hearing,² merely follow over a half century of precedent.

In short, for well over 50 years and probably much earlier, the Department has followed two distinct procedures in determining the validity of mining claims, holding hearings in cases turning on questions of fact and not holding hearings in cases turning on questions of law. As explained in the Deputy Solicitor's decision of September 23, 1957, and the earlier decision in *Clear Gravel Enterprises, Inc.*, 64 I. D. 210 (1957), the *O'Leary* decision involved only the first category of cases. It was not applicable, and was not intended to be applicable, to the second category of cases.

An examination of the hearings provisions of the Administrative Procedure Act, *supra*, demonstrates clearly that they are aimed at and confined to hearings for the purpose of receiving evidence on factual issues. Section 5 of the act (5 U. S. C., 1952 ed., sec. 1004) provides in pertinent part as follows:

¹ Other earlier cases are *James W. Logan*, 29 L. D. 395 (1900); *Colomokas Gold Mining Company*, 28 L. D. 172 (1899); *F. E. Robbins*, 42 L. D. 481 (1913); *Joseph E. McClory et al.*, 50 L. D. 623 (1924); and *John Roberts*, 55 I. D. 430 (1935).

² *Clear Gravel Enterprises, Inc.*, 64 I. D. 210 (1957); *R. J. Walter et al.*, A-27243 (March 15, 1956); *Clear Gravel Enterprises, Inc.*, A-27287 (March 27, 1956); *R. L. Greene et al.*, A-27181 (May 11, 1955); *United States v. Wilmot D. Everett et al.*, A-27010 (October 17, 1955).

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *.

(a) Notice.—Persons entitled to notice of an agency hearing shall be timely informed of * * * (3) *the matters of fact and law asserted.* * * *

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of *facts*, arguments, offers of settlement * * *.

(c) Separation of Functions.—The same officers who preside *at the reception of evidence* pursuant to section 7 shall make the recommended decision or initial decision required by section 8 * * *. * * * no such officer shall consult any person or party *on any fact in issue* unless upon notice and opportunity for all parties to participate * * *. (Italics added.)

Section 7 of the act (5 U. S. C., 1952 ed., sec. 1006), provides in pertinent part as follows:

Sec. 7. In hearings which section 4 [rule making] or 5 requires to be conducted pursuant to this section—

(a) Presiding Officers.—There shall preside *at the taking of evidence* (1) the agency * * *.

(b) Hearing Powers.—Officers presiding at hearings shall have authority * * * to * * * (3) rule upon offers of proof and receive relevant evidence * * *.

(c) Evidence.—* * * Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

(d) Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 * * *. (Italics added.)

Section 8 of the act (5 U. S. C., 1952 ed., sec. 1007) provides in pertinent part as follows:

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) Action by Subordinates.—In cases in which the agency has not presided *at the reception of the evidence*, the officer who presided * * * shall initially decide the case * * *. * * * Whenever the agency makes the initial decision without having presided *at the reception of the evidence*, such officers shall first recommend a decision * * *. (Italics added.)

These sections of the Administrative Procedure Act demonstrate beyond doubt that they envision hearings for the purpose of resolving factual disputes, not proceedings for hearing oral argument on questions of law with the basic facts not in dispute. The petitioner does not deny that small tract leases had been issued for all but two 5-acre tracts included in its claims at the time the claims were located. The only question presented then is the legal question whether mining

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claims could validly have been located on lands already embraced in small tract leases. For what purpose then should a hearing be held under the Administrative Procedure Act? The petitioner does not assay to answer this question. And, if a hearing were held, what would make up the "record" of the hearing upon which a decision would have to be based? The legal argument of counsel, the same type of argument as is usually presented in briefs after a hearing? If so, would counsel be subject to cross-examination on his argument? Further, would such legal argument be entitled to special sanctity or demand a higher degree of respect for having been made at a hearing and constituting part of the "record"? These are pertinent questions which the petitioner does not raise, much less answer. Certainly, if the Department is correct in holding as a matter of law that land under small tract lease is not open to the operation of the mining laws the locator cannot possibly have acquired any right in the land by its attempted locations after small tract leases had issued and a hearing on the question whether the locator may have complied with the mining laws in other respects, such as discovery, would be futile.

It is only when there is a possibility that a right may have been acquired in the land that the rule laid down in the *O'Leary* case is applicable. While a mining claim located on land subject to the operation of the mining laws may be invalid because of no discovery or because of some other reason, such a claim is not void *ab initio*. It was located on land subject to the operation of the mining laws and it is entitled to the protection of those laws until its invalidity is established by due process of law, which, of course, requires a hearing. Such is not the case of a claim located on land not subject to the mining laws. That claim is void from its inception. In the latter case, the Department has the duty of declaring the claim to be of no effect in order that any cloud on the Government's title may be removed and no duty rests on the Department to accord the claimant a hearing prior to declaring that the claim is void *ab initio*.

In the circumstances presented by this case, we do not feel that there is any justification for any further proceedings by the Department in the matter. Unless the petitioner can specify with more particularity than that of its present petition the issue or issues on which it believes itself to be entitled to a hearing under the Administrative Procedure Act, this decision will stand as the final action which the Department will take in the matter of the sixteen claims of the Dredge Corporation.

ELMER F. BENNETT,
Solicitor.

APPEAL OF BLACK HILLS DITCHING CO., INC.

IBCA-145

Decided August 15, 1958

Contracts: Bids: Generally—Contracts: Unforeseeable Causes—Contracts: Delays of Government

A claim of a contractor for an extension of time based on the theory that the Government was obligated to notify it immediately of the award of the contract must be rejected when under the terms of the bid form the Government was allowed sixty days to accept or reject the bid, and notification was given long before the expiration of this period. Moreover, since bids are opened publicly, the contractor could readily have ascertained whether it was the successful bidder.

Contracts: Unforeseeable Causes—Contracts: Delays of Contractor—Contracts: Notices—Contracts: Performance

A claim of a contractor for an extension of time based on delay in securing performance and payment bonds, due to the unexpected liquidation of its bonding company, must be denied, even if it be assumed for the sake of argument that this event was unforeseeable, when it is wholly speculative whether the delay actually made any difference to the contractor. Even if the contractor had been able to obtain the bonds sooner, it does not follow that it would necessarily have been given notice to proceed any earlier than it was given. Moreover, the contractor has not shown that it would have obtained a more favorable performance period if the delay had not occurred.

Contracts: Unforeseeable Causes—Contracts: Acts of Government—Contracts: Performance—Contracts: Specifications

A contractor is not entitled to an extension of time for performance on the ground that the Government required the installation of a different type of pump than that designated in the specifications when there is no showing that either type of pump, the delivery of which would have required from 60 to 90 days, would have arrived on the job at the time of its contemplated installation.

Contracts: Unforeseeable Causes—Contracts: Delays of Contractor—Contracts: Specifications—Contracts: Performance

A contractor who is entitled to an extension of time for performance by reason of such an unforeseeable cause as "unusually severe weather" is none the less entitled to such relief, despite the fact that its progress schedule, which it was required by the specifications to furnish to the Government merely for the latter's information, may have indicated that no work was originally scheduled during part of the period when the unusually severe weather occurred.

BOARD OF CONTRACT APPEALS

Black Hills Ditching Company, Inc., of Rapid City, South Dakota, has appealed from the findings of fact and decision of the contracting officer dated December 3, 1957, denying its request for an extension of time for the performance of Contract No. 14-20-150-9 with the Bureau of Indian Affairs.

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The contract, which was dated September 26, 1955, was on U. S. Standard Form 23 (revised March 1953) and incorporated the General Provisions of U. S. Standard Form 23A (March 1953). It provided for improvements to the sewerage system of the Pierre Indian School, South Dakota. The contract price was \$35,800.

Bids were opened on September 8, 1955, and the appellant was found to be the only bidder. As award of a contract required Departmental approval, it was sought by the contracting officer by air mail letter dated September 14, 1955, and it was given by the Department by telegram on September 19, 1955 which authorized the award of the contract to the appellant on or after September 26, 1955. The contracting officer notified the appellant by telegram on September 26, 1955 that it had been awarded the contract but stated: "Do not proceed with work until specifically authorized to do so by this office." This telegraphic award was confirmed by air mail letter dated September 28, 1955, with which the contract and bond forms were transmitted to the appellant for execution. The appellant's bonding company unexpectedly went out of business, however, and it was not until October 25, 1955 that the appellant returned the contract documents, properly executed, to the contracting officer. The record does not show precisely when they were received by the latter but, since they were sent by mail, it may fairly be assumed that they reached him by October 27, 1955.

Having received them, the contracting officer by telegram gave the appellant notice to proceed on October 31, 1955. Under the terms of the contract, work was required to be started within 20 calendar days of the receipt of such notice, and to be completed within 150 calendar days of the date of the receipt of such notice. Thus, the completion date for all work under the contract was established as March 29, 1956. By Change Order No. 1, dated December 3, 1957, the contracting officer extended the time for completion of the work by reason of "unusually severe weather" by 9 days, or until April 7, 1956.¹ The work, which was actually not commenced until April 5, 1956, was not substantially completed, however, until June 7, 1956, and thus it was 61 days late. As under paragraph 2 of the General Conditions of the specifications liquidated damages were to be imposed in the amount of \$10 per day for each calendar day of delay in the substantial completion of the work beyond the time for completion stated in the contract or any extension thereof, liquidated damages in the amount of \$610 were assessed against the appellant. By its appeal, the appellant, which originally sought an extension of time of

¹The contracting officer found that the weather was "unusually severe" between November 12 to 19, inclusive, and added one day to this period for remobilization.

70 calendar days, seeks an extension of time sufficient to avoid imposition of liquidated damages.

Extensions of time were sought by the appellant during the performance of the contract on a variety of grounds but the contracting officer in his findings and decision held that none of them furnished an adequate basis for such action, except for the "unusually severe weather" which led him to extend the time by Change Order No. 1.

In his notice of appeal, the appellant states generally that he is appealing from "the decisions or findings of fact" of the contracting officer, although in his specific comments on the alleged errors of the contracting officer he does not go into detail with respect to all of them. As a notice of appeal is to be liberally construed, the Board will assume that the appellant is challenging all of the contracting officer's findings and conclusions.

The contract documents in this case contained a "disputes" clause (paragraph 16 of the General Conditions of the specifications), and the usual "delays-damages" clause (clause 5 of the General Provisions of the contract).²

The first ground advanced by the appellant in support of its request for an extension of time was that the contracting officer delayed 18 days in notifying it that it had been awarded the contract, with the result that it was in turn delayed in obtaining firm commitments from suppliers and subcontractors. As this alleged cause of delay arose prior to the award of the contract, the question arises whether the Board has jurisdiction under the "disputes" clause to consider whether the alleged cause of delay was excusable. This question need not be determined, however, since assuming even that the Board has jurisdiction, the contentions of the appellant are clearly without merit. The bid form allowed the Government 60 days within which to notify bidders of the acceptance of a bid, unless the bidder indicated a shorter period of time, and the appellant did not do so in submitting its bid. The Government, in fact, acted with great promptness in informing the appellant of the acceptance of its bid, especially when it is considered that Departmental approval had to be obtained. Moreover, the appellant could readily have found out whether it was the successful bidder, since bids are opened publicly, and bidders may attend the opening, as the appellant was expressly informed in the instructions to bidders.³

² The former provided for the consideration of "any dispute concerning a question of fact arising under this contract * * *," while the latter provided that the contractor should not be charged with liquidated damages "because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor," including but not restricted to certain named causes among which were "acts of the Government" and "unusually severe weather."

³ In paragraph 9 of the instructions under the heading "Bidders Present" it was stated: "At the time fixed for the opening of bids, their contents will be made public for the information of bidders and others properly interested, who may be present either in person or by representative."

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A second ground advanced by the appellant as a justification for an extension of time was the fact that the bonding company with which it dealt suddenly went out of business, and that the necessity of furnishing an up-to-date financial statement to the new bonding company which, it alleges alone required a period of two weeks, caused a delay in returning the signed contract, together with the necessary payment and performance bonds. This delay was longer than it need have been, however, because the new bonding company sent its agent a defective form of power of attorney in connection with the issuance of the bonds. The delay in obtaining the bonds in turn delayed the issuance of the notice to proceed, and the appellant contends, apparently, that he was thus deprived of a period of good working weather in the month of October.

Under the terms of the bid form, the successful bidder was required to execute the contract, and give performance and payment bonds within 20 calendar days of the receipt of the documents unless a longer period of time was allowed by the Government. The contracting officer has found that the appellant took approximately 30 days to sign and return the contract documents. As the contracting officer accepted them and issued notice to proceed with the work, he in effect exercised the privilege accorded him by the contract of allowing a longer period for return than that specified in the bid form.

The contracting officer denied the request of the appellant for an extension of time by reason of the delay in securing the bonds on two separate grounds. The first was that the delay was "within the Contractor's control, and as an exigency of contract execution, foreseeable." The second was that

* * * by reason of its failure to arrange definite commitments with its subcontractors and suppliers, its delay in execution of the contract and bonds, and its complete lack of diligence in commencing and prosecuting the work after receipt of notice to proceed the Contractor deprived itself of at least twenty (20) work days (more than 80% of the estimated construction time) in the most favorable construction season within the contract performance period.

This request for an extension of time seems to involve a number of rather puzzling legal questions. It has been held that the "delays-damages" clause is applicable only when the event that is responsible for delay occurs subsequent to the making of the contract.⁴ Can the clause be applied in the present case despite the facts that the formal contract had not yet been executed, and notice to proceed had not yet been given? Even assuming that this question should be answered in the affirmative, it seems to the Board that this request for an extension of time must be denied, although not precisely on either of the grounds advanced by the contracting officer.

⁴ See *Morrison-Knudsen Co., Inc.*, 60 I. D. 479, 483 (1951)..

The Board does not deem it necessary to decide whether the liquidation of the appellant's bonding company was foreseeable. Even if it be assumed for the sake of argument that it was unforeseeable, there would still seem to be no valid reason for granting the appellant an extension of time. It is wholly speculative whether the delay actually made any difference to the contractor. If it had not occurred, it is probable, although far from certain, that the appellant would have obtained the performance and payment bonds sooner—perhaps before the middle of October. But, even so, it does not follow that the appellant would necessarily have been given notice to proceed any sooner than it was given. In addition, the appellant has not shown that it would have obtained a more favorable performance period if the delay had not occurred. The time lost in obtaining the bonds was not charged against the contract performance period of 150 days, and there is no convincing proof that the loss of this time was a substantial factor in causing the performance of the contract work to be protracted beyond the end of that period.

A third ground advanced by the appellant as a justification for an extension of time was the approval of a pump different from that designated in the specifications. This change was admittedly made by the contracting officer. However, the delivery of either type of pump would have required from 60 to 90 days, and there is nothing to show that either type of pump would have arrived on the job in time to have been installed during the period of operations in the fall of 1955 which the appellant appears to have contemplated in its initial plans for the performance of the contract work. Pump installation would be among the last items of work to be accomplished, and the appellant did no work through the whole of the winter of 1955-56.

The Board now comes to what was really the principal ground on which the appellant sought an extension of time from the contracting officer. The appellant, as already stated, did not actually perform any work at all during either the fall of 1955 or the winter of 1955-56. The work was accomplished entirely during the spring of 1956. Severe winter weather usually prevailed in the region where the work was performed, and it was for this reason perhaps that 150 calendar days were allowed for its performance, although it was actually performed within a period of 56 calendar days, of which only 40 were working days. The appellant contended, however, that it was entitled to an extension of time of 70 calendar days because it encountered weather that was even more severe than usual. The contracting officer, however, limited the extension of time for this reason to the period from November 12 to 20, 1955, inclusive, as already indicated.

Although the appellant's plans for the performance of the work are not entirely clear, the Board must assume that it was in a position to

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prosecute it by at least November 12, 1955, since the contracting officer granted it an extension of time for 9 days, beginning on that date. The refusal of the contracting officer to grant a longer extension of time than this appears to have been due to two reasons: (1) his opinion that the weather during the balance of the month was not unusually severe, and (2) the fact that the appellant's own progress schedule⁵ indicated that it did not intend to perform any further work after November 26, which was to be the date of its winter shutdown.

The contracting officer based his findings with respect to the severity of the weather during the month of November 1955 on official weather data covering the period 1935-1955. On the basis of this weather data, which the contracting officer included in the record, the Board must conclude that the weather was unusually severe throughout the period from November 12 until the end of the month, and that the appellant must be granted an additional extension of time, covering the ten-day period from November 21 to November 30, inclusive.

The fact that the appellant's progress schedule indicated that it did not originally, perhaps, intend to work after November 26 is not necessarily a bar to such action. The Board has held that a document of the nature of the progress schedule in the present case is merely for the information of the Government.⁶ Having furnished it, the appellant was not necessarily bound to adhere to the schedule of work which was outlined in it. If, for instance, the weather was more moderate than usual, there was nothing to prevent the appellant from taking advantage of the situation by putting off to late November, or thereafter, the work scheduled for performance during the first and middle parts of the month.

As for the weather during the period running from March 18, 1956, the scheduled date for the resumption of the work, to June 7, 1956, the date of its substantial completion, the weather data included in the record indicates that the weather was not unusually severe during any part of this period, and the contracting officer was entirely

⁵ Paragraph 23 of the General Conditions of the specifications required the contractor, in order to assist in the coordination of the work, to furnish the contracting officer within 30 days after notice to proceed, with six copies of a progress schedule. This schedule was to be in the form of a bar chart in which the various phases of the work were to be shown by horizontal bars whose length was to be measured in calendar days. The progress schedule was not furnished by the appellant, however, until some time between December 12, 1955, when it was reminded of its dereliction, and January 17, 1956, when the schedule was approved. The copy of the progress schedule included in the record shows that all the work to be performed under the contract was to be performed between the dates of November 6 and 26, 1955, inclusive, and March 18 and 29, 1956, inclusive.

⁶ See *A. S. Horner Construction Co.*, 63 I. D. 401 (1956); *Parker-Schram Co.*, IBCA-71 (January 31, 1957).

justified, therefore, in refusing to grant an extension of time for weather conditions during this period.⁷

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer are affirmed, except that the appellant is granted an additional extension of time of ten days.

WILLIAM SEAGLE, *Member.*

We concur:

THEODORE H. HAAS, *Chairman.*

HERBERT J. SLAUGHTER, *Member.*

RICHFIELD OIL CORPORATION

A-27603

Decided August 18, 1958

Oil and Gas Leases: Assignments or Transfers

Instruments in which an assignor agrees to "sell, assign, convey, transfer, and set over" portions of two leases and the assignee obtains all of the assignor's right under the leases to produce oil or gas from zones below 4,000 feet are assignments and not "subleases in the nature of operating agreements" even though, by separate agreement, the parties to the assignments mutually promise that under certain conditions either party will transfer his interest in the leases to the other party.

Oil and Gas Leases: Assignments or Transfers—Administrative Practice

Where there is a dispute between the parties to a transfer of interests in an oil and gas lease as to whether the transfer constitutes an assignment of record title or an operating agreement, the Department will not approve the transfer until the dispute is resolved by the parties or the courts.

Oil and Gas Leases: Assignments or Transfers

Under section 30 (a) of the Mineral Leasing Act, as enacted on August 8, 1946, an assignment or a sublease of an oil and gas lease cannot take effect unless three original executed counterparts thereof are filed in the proper

⁷ The record contains no weather data for December, 1955, or January and February, 1956. There is, however, a comment in the contracting officer's letter of October 3, 1956 to the contractor to the effect that "the weather for December 1955 and January 1956 was abnormal and more severe than normal." This may have represented merely the impression of the contracting officer, not based on any precise weather data. It does not, in any event, quite amount to a conclusion that the weather was then "unusually severe" within the meaning of the delays-damages provision. Significantly, the contracting officer did not make any finding in his formal findings of December 3, 1956 that the weather was unusually severe in December 1955 and January 1956. The appellant itself, which bears the burden of establishing an excusable cause of delay, has offered no weather data for the months in question.

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land office, and this requirement is applicable to assignments filed for approval after that date even though the assignments were executed prior to that date.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Richfield Oil Corporation has appealed to the Secretary of the Interior from a decision of December 3, 1957, by the Acting Director of the Bureau of Land Management which affirmed a decision of the manager of the Sacramento land office denying the appellant's application for approval of certain agreements, executed on January 15, 1936, transferring interests in oil and gas leases from Universal Consolidated Oil Company to William C. McDuffie as receiver for Richfield Oil Company of California. The appellant is assertedly Richfield Oil Company's successor in interest to the agreements.

The agreements here under consideration involve portions of lands covered by oil and gas lease Sacramento 019376 (formerly Visalia 09301) and Sacramento 019377 (formerly Visalia 09302), which are exchange leases issued on November 13, 1939, pursuant to section 2 (a) of the act of August 21, 1935 (49 Stat. 679), to Universal Consolidated Oil Company for 10 years and so long thereafter as oil or gas is produced in paying quantities. The leases, which were originally issued under section 18 of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 227), were acquired by Universal Consolidated Oil Company by assignments approved February 5, 1923.

On July 17, 1956, the appellant filed two separate instruments, executed on January 15, 1936, each entitled "Assignment" affecting, respectively, each of the above-identified leases. An unsigned photostatic copy of each assignment was included with the application. Another instrument executed on January 15, 1936, entitled "Mutual Agreement" (and an unsigned photostatic copy of this agreement), which defines the privileges, rights, and obligations of the parties to the assignments, was also filed with the application. Under each of the assignments, Universal Consolidated transferred its interest in oil and gas below 4,000 feet on a portion of the lands covered by the leases to William C. McDuffie as receiver for Richfield Oil Company of California.¹ The assignment of interests in 019376 sets forth the title of the assignor, Universal Consolidated Oil Company, and recites that the assignor—

¹In a letter of December 17, 1936, to the Director, Petroleum Conservation Division, counsel for Universal stated that the assignments and the agreement were entered into in the settlement of litigation by the minority stockholders of Universal Consolidated Oil Company against the receiver of Richfield Oil Company of California. The settlement was made pursuant to an agreement entered into November 19, 1935, between the receiver and a representative of Universal. The agreement that Richfield was to have certain rights to oil and gas below 4,000 feet in leases Sacramento 019376 and 019377 was only one of the provisions of the agreement of November 19, 1935, pursuant to which the formal assignments and mutual agreement respecting the two leases here

does hereby *sell, assign, convey, transfer and set over*, subject to the approval of the United States of America, to William C. McDuffie as Receiver of Richfield Oil Company of California, his successors and assigns, subject to the terms and conditions of an Agreement between Assignor and William C. McDuffie as Receiver of Richfield Oil Company of California executed concurrently herewith, *said lease* dated August 23, 1920 in so far as it pertains to the right to produce oil, gas and/or other hydrocarbon substances from a depth greater than four thousand (4,000) feet * * *. (Italics added.)

from certain described portions of the lease, including the S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the S $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$, sec. 18, T. 26 S., R. 21 E., M. D. B. & M. The assignment of interests in lease Sacramento 019377 contains similar provisions transferring to William C. McDuffie as receiver for Richfield portions of lease 019377 for producing oil and gas below 4,000 feet.

The "Mutual Agreement" executed in connection with the assignments refers to the conveyances from Universal to Richfield covering "production rights" in oil, gas and other hydrocarbon substances beneath 4,000 feet under these leases and recites that the parties desire to agree as to their rights, powers, privileges, and obligations in respect to the premises divided between them. Paragraph 3 of the agreement provides in relevant part:

3. That the rights so conveyed to Richfield shall be subject to no conditions or limitations whatever, save that the portions thereof included within areas now held under lease by Universal shall be subject to the provisions of the pertinent lease or leases, and to the covenants and conditions respecting the same as in this agreement set forth. * * *

Paragraph 8 of the agreement provides:

8. That Universal shall join with Richfield on Richfield's request in writing, to procure the consent of the United States of America *to the conveyance to Richfield of all those portions of said leases with the United States of America to be conveyed to Richfield as hereinabove set forth*. In the event such consent is not obtained within sixty (60) days after application therefor, Universal shall immediately upon Richfield's request in writing, execute with Richfield *an oper-*

under consideration were entered into on January 15, 1936. A carbon copy of each of the two assignments and of the mutual agreement was enclosed with the letter of December 17, 1936.

The appellant filed with the application in this case a copy of a court order of January 15, 1936, of the United States District Court, Southern District, California, in Consolidated Cause No. S-125-J authorizing the settlement of claims of Universal Consolidated Oil Company on the petition of William C. McDuffie, as receiver of Richfield Oil Company of California. The decree confirmed and approved, subject to the fulfillment of the conditions contained in paragraph 4 of the order, the agreement between E. G. Starr (representative of Universal Consolidated) and William C. McDuffie, receiver of Richfield Oil Company, dated November 19, 1935. A copy of the agreement of November 19, 1935, is not in the records on this appeal.

The appellant's application and appeal state that the interest held by the Receivership Company under the agreement was transferred and conveyed by the Receivership Company to the appellant on March 12, 1937, under an order dated March 9, 1937, entered in the United States District Court, Southern District of California, in proceedings in bankruptcy for the reorganization of the Receivership Company (No. 28700-J) in which the court directed that the properties of the latter company be transferred to the appellant on March 12, 1937. There is no copy of the order of March 9, 1937, in the record.

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ating or other agreement by the provisions of which Richfield shall acquire the same rights and privileges in said zones below 4000 feet as Richfield would have acquired if such conveyances herein referred to were effected. Any such agreement shall be and remain in full force and effect until such time as conveyances as herein referred to shall be fully accomplished. (*Italics added.*)

On two occasions within a year after the assignments were executed, the Commissioner of the General Land Office (predecessor of the Director, Bureau of Land Management) informed Universal Consolidated like assignments of deep sand rights separate from shallow sand rights like those here under consideration were not acceptable and would not be approved. In a letter of February 5, 1936, to counsel for Universal, referring to Universal's proposal to assign oil and gas rights below a specified depth, the Commissioner of the General Land Office, relying on a decision approved by the Department on January 31, 1936, involving Billings 021056, stated that assignments which attempted to transfer an interest in strata or sands would not be approved by the Department and that the Department would not approve any instrument, regardless of the arrangement or method provided, which tended to assign the deep sand rights separate and apart from the shallow sand rights. In reply to a letter of December 17, 1936, from counsel for Universal requesting advice as to how the agreements could be handled (*supra*, fn. 1), the Commissioner, in a letter of January 14, 1937, stated that in the opinion of the General Land Office, a conveyance of record title in terms of sands or zones rather than of legal subdivisions was not harmonious with efficient administration of oil and gas leases, but added that substantially the same result could be accomplished between the companies through the medium of an operating agreement instead of an outright assignment. The Commissioner stated that if an operating agreement were submitted in which record title to the leases remained in Universal and Richfield were granted exclusive operating rights with respect to the deep zones, such an agreement would be considered with a view toward recommending to the Department that it be approved. It is noted that counsel for Universal, in this correspondence about the assignments, regarded the assignments and mutual agreement (copies of which were enclosed with his letter of December 17, 1936) as a transfer of record title and not as operating agreements.

The appellant's application of July 17, 1956, requests that each of the assignments of January 15, 1936, be approved as "a sublease in the nature of an operating agreement" and states that Universal, the appellant, and the appellant's predecessor from the time the agreements were executed until June 1, 1956, were under the misconception that the instruments constituted assignments of record title to the leases whereas, actually, they constitute "subleases in the nature of operating agreements."

The appellant's application of July 17, 1956, asserts also that on February 8, 1937, Universal addressed a letter to Richfield, enclosing a copy of the Commissioner's letter of January 14, 1937, referred to above, stating that if Richfield would prepare and submit a form of operating agreement, it would be considered for execution; that at various times during the period from February 8, 1937, until the present time, the appellant and its predecessor have attempted to work out an operating agreement with Universal, without success; that on or about April 23, 1956, the appellant submitted a form of an operating agreement to Universal for consideration, and Universal failed and refused to consider the operating agreement and now refuses to execute an operating agreement or any other document with the appellant.

Although a copy of the Acting Director's decision from which this appeal was taken was mailed to Universal Consolidated Oil Company and the company was named a party to the manager's decision rejecting the appellant's application, and presumably received notices of the appeals which the applicant has filed from the manager's and Acting Director's decisions denying approval of the instruments, the company has not entered the proceedings in the instant case.

The manager's decision of August 6, 1956, denied the appellant's application for approval of the instruments filed July 17, 1956, for a number of reasons, including the fact that the copies of the assignments are not fully executed; that the assignment under 019376 describes less than a legal subdivision and such an assignment will not be approved unless the necessity therefor is established by clear and convincing evidence; that the assignments were entered into by all parties involved as assignments of record title interests and, even if they had been properly executed and filed, they could not, at this time, be approved as operating agreements without the consent of all parties involved.²

The Acting Director's decision affirmed the manager's decision on the ground that the instruments of transfer conveyed the entire estate of the lessor in zones below 4,000 feet covered by the leases and were therefore assignments and not subleases or operating agreements; that assignments of only parts of legal subdivisions and of separate zones or deposits of leased lands will not be approved unless the necessity therefor is established by clear and convincing evidence; and that three original executed counterparts of any assignment must be sub-

² Departmental regulations governing the assignment or transfer of leases or interests therein provide in part that an assignment of a separate zone or deposit or of a part of a legal subdivision will not be approved unless the necessity therefor is established by clear and convincing evidence (43 CFR 192.140); that the request for approval of a transfer affecting the record title of an oil and gas lease must be made within 90 days from the date of execution of the assignment by the parties (43 CFR 192.141 (a) (2)); and that assignments of record title interests must be filed in triplicate (43 CFR 192.141 (c)).

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mitted if approval of the assignment is to be given by the Department, citing in support of the last requirement the departmental decision in the case of *David L. Mills*, A-26949 (September 27, 1954).

On this appeal, it is again contended that the documents entitled "Assignment" and "Mutual Agreement," are, in effect, subleases in the nature of operating agreements and not assignments of record title. The appellant relies principally on the provisions in paragraphs numbered 4, 5, 6, and 7 of the mutual agreement in support of this contention. These paragraphs provide, in effect, that if either of the parties fails to perform specified drilling, operating, and producing requirements, the defaulting party shall surrender or convey (in paragraph 7, surrender *and* convey) to the other all of the interest of the defaulting party in and to the lease (with exceptions not here relevant).

Although I do not agree with the appellant's interpretation of these provisions as establishing that the instruments in question are subleases in the nature of operating agreements, I see no point in discussing them at length, for whatever favorable support they lend to appellant's position is more than overcome by the specific words of the assignments. Each assignment specified that the assignor "does hereby sell, assign, convey, transfer, and set over * * * said lease," the ordinary words of assigning a lease.³ In the case of *Ray Sorrell*, 59 I. D. 278 (1946), the Department held that an instrument which recites that the lease owner "bargains, sells, transfers, assigns and conveys all of his right, title, and interest" in and to a lease is an assignment and not a sublease. There is no basis for distinguishing the words of conveyance in the assignments here under consideration from those in the *Sorrell* case except that the instant assignments conveyed the assignor's entire right under the leases to only the deep zones on designated parts of the leaseholds.

Moreover, considering that at the time of execution, the instruments were called assignments, that in defining their respective rights under the instrument (in paragraph 8 of the mutual agreement) the parties thereto described the assignments as conveyances of portions of the leases, and agreed to execute an *operating* or other agreement if the United States did not consent to the conveyances by these assignments, and that for over 20 years after the execution of the instruments in question the parties considered them to be assignments, the appellant's contention that the assignments are subleases in the nature of operating agreements is not persuasive.

³ It may be noted, incidentally, that Universal Consolidated acquired Sacramento 019367 by an instrument reciting that the assignor "does sell, assign, transfer and set over" the lease, subject to the approval of the Secretary.

Accordingly, I see no reason to disturb the determination in the Acting Director's decision that the instruments which the appellant requests be approved as subleases in the nature of operating agreements are assignments.

In any event, even though it were more certain that the assignments are in fact operating agreements, it would be contrary to the established practice of the Department to approve them as operating agreements at this juncture. The appellant states on appeal that as late as January 3, 1958, appellant's counsel discussed the matter in controversy with an official of Universal and that Universal refused to consent to the instruments being considered as operating agreements. In fact, Universal has at no time joined in appellant's request that the instruments be approved as operating agreements. Obviously, the parties disagree as to the nature of the instruments. In like circumstances it has been the traditional position of the Department that matters of private contract dispute are for the parties and the courts, not the Department, to decide.⁴ See *John H. Corridon*, A-27390 (February 18, 1957), and cases cited therein.

The appellant requests that if the documents constitute assignments, the Department waive the regulatory requirements that three original executed counterparts of an assignment must be submitted and that a request for approval of an assignment must be filed within 90 days from the date of execution of the assignment, pointing out that it is impossible to obtain a re-execution of these documents in multiple copies since they were executed under court order and Universal has refused to execute new agreements; and that retroactive effect should not be given to these requirements which were not in effect when the documents were executed.

However, the Department has no authority to waive the requirement in section 30 (a) of the Mineral Leasing Act that three original executed counterparts of an assignment or a sublease must be filed before such an instrument is effective (30 U. S. C., 1952 ed., sec. 187a; 43 CFR 192.141 (c)). The appellant's assertion that such a requirement gives retroactive effect to the provision because there was no such requirement when the agreements were executed is not meritorious. The documents were not filed until 1956, more than 20 years after they were executed, and assignments which are filed for approval in 1956 are subject to the statutory and regulatory requirements in effect at the time of filing. Accordingly, the Acting Director's decision that the applicant's failure to file three original executed counterparts of these agreements requires the rejection of

⁴ It is noted that paragraph 12 of the mutual agreement provides for arbitration of disputes between the parties with respect to the "interpretation" or performance of the agreement.

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the appellant's application for their approval is correct (*David L. Mills, supra*).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 21, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

APPEAL OF PAUL C. HELMICK COMPANY

IBCA-39 (Supp.) *Decided August 21, 1958*

Contracts: Damages: Generally—Contracts: Substantial Evidence—Rules of Practice: Evidence

Under a contract for the clearing of a transmission line right-of-way within a national forest which provides that the contractor shall pay "suppression costs and damages resulting from any fires caused by his operations," a claim by the Government for payment of such costs and damages is allowable when the fact that the fire was caused by the contractor's operations is established by a preponderance of the evidence. Evidence showing that the fire started at a place where smoking would have been particularly dangerous and would probably have resulted in the immediate discharge of an employee detected in so doing, that a group of the contractor's employees ate lunch extremely close to this place within approximately 30 minutes before the discovery of the fire, that one of these employees was an habitual smoker, that following the lunch period this employee had a clear opportunity for undetected smoking at the place where the fire started, that the possibility of the fire having been started by occurrences other than smoking was remote, that the possibility of persons other than the contractor's employees having been sufficiently close in point of time and distance to have started the fire was likewise remote, and that the employee who was an habitual smoker had not denied that he did smoke during or after the lunch period, but, in statements made shortly after the fire, had asserted that, while he was aware of the hazards of smoking in the woods and took precautions against fire whenever he did so, he could not remember whether he had smoked on this occasion, is sufficient to establish that the fire was caused by carelessness on the part of one of the contractor's employees.

Contracts: Substantial Evidence—Rules of Practice: Witnesses

In a proceeding under the "disputes" clause of a contract where the controversy arises out of a claim by the Government for suppression costs and damages incurred as a result of a fire alleged to have been caused by the contractor's operations, testimony by fire experts, even though they may be personnel of the agency that incurred such costs and damages, with respect to the probable cause of the fire is admissible.

BOARD OF CONTRACT APPEALS

The Paul C. Helmick Company has appealed from the supplemental findings of fact and decision of the contracting officer dated

August 24, 1956, and made pursuant to the direction of the Board in its decision of July 31, 1956,¹ which considered various claims of the contractor under its contract with the Bonneville Power Administration, providing for the clearing of the right-of-way for the Chief Joseph-Snohomish Transmission Line.

In his supplemental findings and decision the contracting officer determined that a forest fire that had occurred on September 15, 1953, on Nason Ridge within the Wenatchee National Forest had been caused by the contractor's operations and that the contractor was obligated to pay the United States Forest Service the sum of \$10,232.55 as its costs of suppressing the fire and as damages to National Forest lands.² This determination was made pursuant to paragraph 603A of the specifications under the contract, providing as follows:

The contractor shall do everything reasonable in its power and shall require his employees to do everything reasonably within their power, both independently and upon request of officers of the Forest Service, to prevent and suppress fires *on or near* any lands to be occupied under this permit. The contractor shall pay the United States Forest Service, or other duly authorized protective agency, the suppression costs and damages resulting from any fires *caused by his operations*. (Italics supplied.)

One of the claims of the contractor in the original appeal to the Board was for additional compensation in the amount of \$7,945.24 for its costs of suppressing the fire of September 15, 1953. As the fire had occurred on or near the right-of-way on which the contractor's forces were working, the Board held that the contractor was not entitled to recover the costs of suppressing the fire, notwithstanding the fact that the fire may not have been caused by its operations. The Board held, moreover, that if the fire were caused by its operations, it would be liable to the Forest Service for its costs of suppressing the fire and for damages to National Forest lands, and that the contracting officer was justified in withholding from the payments due to the contractor an amount sufficient to cover this contingent liability.

The chief officer of the contractor and its general superintendent testified at the hearing on the original appeal with respect to the origin of the fire, and statements with respect thereto obtained from the members of the clearing crew who had been present at the scene of

¹ 63 I. D. 209.

² This amount was withheld from the payments due to the contractor pursuant to the procedure set forth in Circular B-97385, dated May 18, 1954 of the Comptroller General (33 Comp. Gen. 682). The contracting officer referred the claim to the Comptroller General for settlement but the latter held that the determination of the question of the contractor's responsibility for the fire was subject to the disputes clause of the contract, and that factual findings with respect to the causation of the fire should therefore be made by the contracting officer subject to appeal to the Board, as provided in the disputes clause.

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the fire were offered by the contractor and received in evidence. As the original finding of the contracting officer that the contractor was responsible for the fire was a mere conclusion unsupported by evidentiary facts, however, the Board directed the making of the supplemental findings which have led to the present appeal.

As a part of the proceedings on this appeal a hearing for the purpose of taking testimony with respect to the cause of the fire and the extent of the damages attributable thereto was held in Seattle, Washington, on April 29 and 30 and May 1, 1957, before Mr. Herbert J. Slaughter, a member of the Board.

The Board will assume for the purpose of disposing of the appeal that the burden of establishing the fact that the fire was caused by the contractor's operations, within the meaning of the contract provision quoted above, is on the Government. It should be emphasized, however, that since the appeal involves only a question of civil liability, the Government need prove this fact only by a preponderance of the evidence.

In his supplemental findings, the contracting officer set forth the following with respect to the origin of the fire:

According to the report of the Forest Service the fire broke out within the area subject to the easement acquired by the BPA for a transmission line about 12:30 p. m. on September 15, 1953, approximately ten feet from a point where the contractor's clearing crew was eating lunch as indicated by their lunch wrappers, egg shells and other material. The fire occurred in highly inflammable slash and dry growth and spread rapidly through a draw filled with right-of-way slash. The area in which the fire broke out is remote and does not attract the public from a recreational standpoint. The Forest Service has engaged in an exhaustive search to discover the possible sources of the fire. It has eliminated combustion from the action of sun on glass or other similar material. There had been no lightning in the area for a long period of time. Thus, the causes which could be considered natural have been excluded. The crew member who acknowledged use of cigarettes has not affirmatively denied that he may have smoked during or after the lunch period on September 15. It remains, therefore, that the only cause of the fire could be the contractor's operations. He was in exclusive control of the immediate area, and the statements of his crew do not overcome the probability that they caused the fire.

The findings of the contracting officer were based on an investigation of the causes of the fire made by the U. S. Forest Service immediately after its occurrence. Based upon this investigation, the Service concluded that the fire had been caused by the contractor's operations.

Three of the personnel of the U. S. Forest Service, Erwin Peters, Reuben Johnson and Jack Handy, on whose investigation of the cause of the fire the conclusion of the Service was based, testified at the hearing and were subjected to cross examination. All three had had technical training and practical experience concerning forest fires,

and their expert opinions are not to be rejected merely because in a sense they were interested witnesses. There is nothing in the record that casts doubt upon their competence or honesty. Indeed, William H. Ryan, the contractor's General Superintendent, who also testified at the hearing, conceded the reliability and good judgment of Peters (Tr., p. 500). On the other hand, the contractor produced no expert testimony at all at the hearing. Contrary to the contention of the contractor, the testimony of fire experts as to the cause of a fire is admissible.³

The testimony rules out such causes of the fire as spontaneous combustion; lightning; sparks from a railroad engine (there was no railroad in the area); the use of power equipment by the contractor (none had been used for a considerable time before the fire); and recreational activities (it was not a recreational area). It follows that the fire could have been caused only by some other form of human agency. Among fires caused by men, a common type is the smoker fire.⁴ Indeed, Ryan himself at first attributed the fire to such a cause. He remarked to a Bonneville clearing inspector the very afternoon of the fire that "the fire started where his clearing crew had eaten lunch, presumably from a careless cigarette."⁵

The testimony shows that the fire started on a steep slope within a small draw that was sheltered from the wind by ridges on either side. It also shows that one of the contractor's clearing crews, consisting of five men, and headed by Vic Logan, their foreman, ate lunch at about noon in a spot that was either within the draw or just outside its lower end. The fire started extremely close to this spot within approximately thirty minutes after the men had resumed work; and burned rapidly up the hillside. The fire thus started in close proximity to the spot where the crew had eaten lunch, and shortly after the lunch had been completed. These are two hard facts which the Board can hardly disregard in assessing responsibility for the fire, especially when they

³ See, for instance, *Hinckley v. Shell Oil Co.*, 221 Pac. 594 (Wash. 1923); *Gechijian v. Richmond Insurance Co.*, 25 N. E. 2d 191 (Mass. 1940); *Fair Mercantile Co. v. St. Paul Fire & Marine Insurance Co.*, 175 S. W. 2d 930 (Mo. 1943); *Gilbert v. Gulf Oil Corp.*, 175 F. 2d 705 (4th Cir. 1949).

⁴ Handy testified as follows with respect to what statistics showed in relation to forest fires in the Wenatchee National Forest: "Well, between the two main groups of causes, lightning and man-caused fires, normally about 70 percent of our fires on the Wenatchee Forest were caused from lightning; and 30 percent of them were caused by man; and, oh, somewhere around 27 percent of the man-caused fires were smoker fires." (Tr., p. 129.)

⁵ Ryan denied at the hearing that he had made any such statement but the Board is unable to credit his denial, in view of the fact that the remark was recorded in a contemporaneous report made by the Bonneville clearing inspector, whose name was Dean M. Oviatt. The report was made on September 18, 1953, which was only 3 days after the fire. Moreover, it is entirely natural that Ryan should have made the remark. According to John Maestas, one of the contractor's foremen, who also testified at the hearing, Ryan harped on the dangers of smoking "all of the time" (Tr., p. 394).

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are coupled with the further fact that among the members of the clearing crew was an habitual smoker. This man was named Jerry Floyd.

It is true that there is no direct evidence that Jerry Floyd was seen in the act of lighting a cigarette or smoking or throwing a cigarette butt away. However, it is hardly to be expected that such evidence would be available. The weather had been dry for weeks before the fire, there was dry slash in the draw where the fire started, and gusts of wind were blowing. Smoking under such circumstances was particularly dangerous. It was also an easy way to lose one's job, for Ryan's policy was to fire immediately employees who were caught violating the contractor's smoking instructions. Hence, if Floyd had wished to smoke, it is hardly likely that he would have done so in the view of his companions. Particularly is this so when the ridges and brush piles of the draw provided a secluded site for an after-lunch smoke, to which the location of Floyd's job gave him ready access with little probability of his absence being detected by the foreman or the superintendent.

The only members of the clearing crew to testify at the hearing were Vic Logan, the foreman, and Cordell Cloer. Both testified that the members of the clearing crew never separated during the half-hour lunch period, and that neither observed anyone smoking. This testimony, however, is insufficient to remove Floyd from consideration as a cause of the fire, in view of the clear opportunity which the latter had to smoke in the draw during the period of at least a quarter of an hour that elapsed between the end of the lunch period and the discovery of the fire.

The record does not show that Jerry Floyd himself ever explicitly denied that he had been smoking after lunch on the day of the fire. In two written statements he made within approximately two weeks after the fire, he merely said he did not remember whether he had smoked the day of the fire. In the second statement he expressed a keen awareness of the hazards of smoking in the woods, and mentioned the precautions he took to extinguish cigarette butts whenever he did smoke in the woods. If Floyd, indeed, was aware of such hazards and took such precautions, it would seem that he would have remembered whether or not he did smoke in or near the draw, with its highly combustible contents, for at least the few minutes that elapsed before the importance of this question must have been firmly fixed in his mind by the outbreak of a major fire hard by the point where he had been working. It is thus difficult to reconcile Floyd's protestations of carefulness with his asserted lapse of memory. The record contains no explanation of why he was not produced and called as a witness at the hearing by the contractor. Apparently, he was no

longer employed by the contractor at the time of the hearing but the same was true of at least three of the seven witnesses called by it who had been its employees at the time of the fire.⁶ The contractor's failure to call Floyd is certainly not an indication of his innocence.

The contractor made a considerable effort at the hearing to prove that there were two strangers in the vicinity of the fire at about the time of its occurrence. The testimony of the contractor's witnesses is far from consistent with reference to this question.⁷ Neither Vic Logan nor Cordell Cloer, who were probably closest to the supposed strangers, saw them. Ryan testified that he had seen George F. Wolfe, a Bonneville inspector, going towards the area where the fire began, although in a statement which he made after the fire he had declared: "I myself did not see anyone else in the area but my brush crew reported that they had seen one or two strangers in the area that morning." The most positive testimony with respect to the two strangers was given by John Maestas, one of the Helmick foremen. He testified that he saw two strangers at about 11 a. m. on the day of the fire and he placed them "in the woods" and at "quite a distance" from where the Helmick people were working. Charles E. Bates, a Helmick cat operator, testified that his attention was called to the two strangers by Maestas between 11 a. m. and noon, and he placed them at least 500 to 600 feet from the point of the fire.

The Government concedes that two of its inspectors, George F. Wolfe and Dean M. Oviatt, were on the job on the day the fire occurred. William C. Shirran, Area Construction Superintendent for Bonneville, testified that one of the two inspectors was a smoker, although he could not identify the one who smoked. In a deposition included in the record Oviatt conceded that he was a smoker. Hence it may be concluded that Wolfe was the inspector who did not smoke. Wolfe was more than a half mile away from the fire at 1:30 p. m., but, as Ryan testified, may have been nearer during the morning hours.⁸ Oviatt's place of duty was in the Mill Creek area, about ten miles away from the point where the fire started, and he was in that area when he was first told about the fire at about 2:30 p. m. It is apparent that the inspector who did not smoke was closest to the fire, while the inspector who did smoke was extremely remote from the point of origin of the fire.

⁶ The record does not show whether two of these seven witnesses for the contractor were still employed by it at the time of the hearing.

⁷ Indeed, speaking generally, the contractor's witnesses seem to have had a quite imperfect recollection of the details of what happened. Not only were there variations in crucial respects between the testimony of different witnesses, but also in the case of some witnesses there were like variations between the testimony given at the hearing and the statements made by the same witnesses shortly after the fire.

⁸ Wolfe was no longer in the employ of the Bonneville Power Administration at the time of the hearing, and counsel for the Government stated that efforts to ascertain his whereabouts had been unsuccessful.

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The evidence leaves serious doubt that any of the contractor's employees really saw any persons, other than the contractor's men, in the vicinity on the morning of the day of the fire. But, if they did actually see strangers or Bonneville inspectors, whether one or two, their own testimony demonstrates that the persons they saw were on the scene too early in point of time and too far in point of distance for there to be any reasonable degree of likelihood that the presence of these persons was connected with the subsequent outbreak of the fire. Moreover, even if such a connection be conceded to be a remote possibility, it is not enough to warrant the rejection of the far greater likelihood that the fire was caused by carelessness on the part of the smoking member of the contractor's clearing crew. The preponderance of the evidence supports this conclusion.

As for the question of the extent of the damages for which the contractor should be held liable, the record supports the Government computation of \$10,232.55, which includes the cost of suppressing the fire and the value of the National Forest resources that were lost. Indeed, the Government was moderate in excluding charges for the regular time of some of the Forest Service personnel, notwithstanding the decision in *United States v. Chesapeake & Ohio Ry. Co.*, 130 F. 2d 308 (4th Cir. 1942), *aff'd* 139 F. 2d 632 (1944), holding that such charges are allowable as damages.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the supplemental findings of fact and decision of the contracting officer dated August 24, 1956, are affirmed.

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

S. M. COVEY ET AL.

A-27639

Decided August 21, 1958

Oil and Gas Leases: Cancellation

A noncompetitive oil and gas lease on lands not known to contain valuable deposits of oil or gas is properly canceled where the lessees are notified by registered mail that either a bond must be filed or advance rental must be paid under their lease and that if the default continues after 30 days from service of notice thereof the lease will be canceled without further notice, and where the lessees did not comply with the requirement.

Oil and Gas Leases: Cancellation—Notice

Section 31 of the Mineral Leasing Act, authorizing cancellation of a noncompetitive oil and gas lease for failure to comply with the terms of the lease after 30 days' notice sent by registered mail to the record address of the lease owner, is fully complied with when the default notice was sent to a person representing himself as attorney for the lease owners, and where all previous notices had been addressed in care of such attorney and the lease owners had never indicated any other address to which notices and communications concerning the lease should be sent.

Oil and Gas Leases: Cancellation

The fact that previous defaults on the part of lessees may have been waived, does not estop the cancellation of an oil and gas lease where the present default has continued for 30 days after notice.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

S. M. Covey and seven others¹ have appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated January 10, 1958, which affirmed the action of the manager of the Salt Lake City, Utah, land office, canceling their noncompetitive oil and gas lease Utah 0415 and thereafter refusing tender of the tenth year's rental thereunder.

The lease was originally issued as of June 1, 1947, to E. B. Clark. Thereafter, it was assigned to S. M. Covey. Assignment from S. M. Covey of a one-eighth interest in the lease to each of the other seven appellants was made, effective March 1, 1951. The lease was canceled on April 17, 1956, after notice to the lessees that their lease was in default for failure to pay the tenth year's rental in advance or in lieu thereof to furnish a \$1,000 bond not less than 90 days before the date on which the annual rental for the tenth year of the lease was due and after the default had continued for 30 days after notice. On May 25, 1956, two of the lessees attempted to pay the annual rental, but the manager refused to accept their check because the lease had been canceled.

The appellants contend that the manager accepted all previous annual rentals less than 90 days before the due date of the next unpaid annual rental without requiring a bond and that, in so accepting the payments, the manager thereby waived any requirement of posting the bond and should be estopped from canceling the lease.

Section 2 (a) (5) of the lease provides that the lessee agrees, where a bond is not otherwise required, to furnish, not less than 90 days before the due date of the next unpaid annual rental, a \$1,000 bond, conditioned on compliance with the lease obligations, but that this requirement may be successively dispensed with by the payment of each successive annual rental not less than 90 days prior to its due

¹ The names of the other appellants are: S. G. Covey, Theron S. Covey, F. K. Gilroy, Mae C. Gardner, Lucille C. Richards, H. T. Covey, and A. A. Covey.

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date. Section 7 of the lease provides that if the lessee shall not comply with any of the provisions of the lease or if he defaults in the performance or observance of any of the terms of the lease and if such default shall continue for a period of 30 days after service of written notice thereof by the lessor, the lease may be canceled by the Secretary of the Interior in accordance with section 31 of the Mineral Leasing Act. Section 7 further provides:

A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture or for the same cause occurring at any other time.

Thus the fact that previous defaults on the part of the lessees may have been waived did not estop the manager from canceling the lease for a subsequent default.

The appellants also contend that section 31 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 188), requires that the notice in advance of cancellation shall be sent to the lease owner, directed to his record post office address. They contend now that they never received the default notice and that they never authorized the address of record which was used by the manager in sending notices and correspondence in this case. In this connection it is to be noted that in their appeal to the Director the appellants admitted the receipt of the default notice by one of the lessees, which notice was forwarded by their attorney, to whose office the default notice had been directed.

The record shows that on February 13, 1951, there was filed in the Salt Lake City land office an assignment from S. M. Covey of a one-eighth interest in the lease to each of the other appellants. The addresses of the assignor and the assignees were given as "Salt Lake City, Utah." Accompanying the assignment was an affidavit signed by Richard L. Bird, Jr., which stated that Mr. Bird "is an attorney at law in Salt Lake City, Utah, and is attorney for H. T. Covey, A. A. Covey, and others in connection with the oil and gas matters on federal leases." The record indicates that "Richards and Bird by Richard L. Bird, Jr.," as "Attorney for S. M. Covey and others" requested an extension of the lease for an additional 5-year period and that the attorneys' law office is located at 716 Newhouse Building, Salt Lake City, Utah.

Notices that the annual rentals for the sixth, seventh, eighth, and ninth years, as well as for the tenth year of the lease, were due were sent to the lessees in care of Richards and Bird and a default notice dated March 2, 1955, for failure to pay the rental in advance or file a bond, was likewise sent to the lessees in care of their attorneys.

The record contains no communication concerning the lease from any person other than Richard L. Bird, Jr., nor is there any advice

that communications and notices concerning the lease should be sent to any address other than that of Richards and Bird, 716 Newhouse Building, Salt Lake City, Utah. In summary, while it may be true that the appellants did not file an official document stating that the address of Richards and Bird was the address to which all notices and communications concerning the lease were to be sent, at the same time Richard L. Bird, Jr., of that law firm, was held forth as their attorney and the lessees submitted no other address to which such notices should be sent.²

Under the circumstances, it must be held that the default notice sent by registered mail to the lessees in care of Richards and Bird was sent to the "record post-office address" of the lease owners and, therefore, that the requirement of section 31 of the Mineral Leasing Act was complied with.

The regulations cited by the appellants are not applicable. 43 CFR 192.42 (e) (3) provides that evidence of the authority of an attorney in fact or agent must be presented "if the offer is signed by such attorney or agent on behalf of the offeror." There is no lease offer involved in this appeal. 43 CFR 192.141 (b) provides that where an attorney in fact, on behalf of the holder of a lease, signs an assignment of the lease or signs the application for approval, there must be furnished evidence of the authority of the attorney to execute the assignment or application. As the assignment from S. M. Covey to the other appellants was not executed by Richard L. Bird, Jr., in behalf of the assignor and as the application for approval thereof was not signed by him but, on the contrary, was signed by the parties themselves and, apparently, merely filed by Richard L. Bird, Jr., as their attorney, that regulation has no bearing on this case.

It is, therefore, concluded that no error was committed in canceling the lease and in thereafter refusing tender of the rental.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

² It is noted that all of the appellants are represented by Richards and Bird, acting through Richard L. Bird, Jr., in this proceeding and that they were likewise so represented in the proceeding before the Director.

*August 26, 1958***URANIUM EXPLORATION COMPANY OF CALIFORNIA****IA-913***Decided August 26, 1958***Administrative Practice—Contracts: Interpretation**

When the cancellation procedure prescribed by a lease contract provides that the lessee may request a hearing within a specified period after a day named, the designated day after which the period of time begins to run is not to be included in the computation. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday.

Administrative Practice—Contracts: Interpretation—Contracts: Notices

Where a contract requires notice within a specified period, but does not specify the manner in which notice is to be given, the mere mailing of notice is not sufficient unless it is received within the time specified.

Indian Lands—Leases and Permits: Minerals

Failure on the part of the lessee of a mining lease of Indian lands to exercise diligence in the conduct of the prospecting and mining operations, or failure to act in good faith to develop the land for mining the minerals specified will give cause for the cancellation of the lease.

APPEAL FROM THE BUREAU OF INDIAN AFFAIRS

Uranium Exploration Company of California, a California corporation licensed to do business in the State of Arizona, has appealed to the Secretary of the Interior from a decision of the Commissioner of Indian Affairs dated February 5, 1958, affirming the action of the Area Director, Phoenix, Arizona, in the cancellation of a mining lease of tribal Indian lands of the Hualapai Indian Reservation.

The lease, dated June 21, 1956, and approved September 10, 1956, was made and entered into between the Hualapai Indian Tribe of Arizona and Uranium Exploration Company of California for described tracts of land containing about 1,460 acres for the sole purpose of prospecting for and mining minerals. The lease provides, among other things, that the lessee shall exercise diligence in the conduct of the prospecting and mining operations; that the land shall not be held by the lessee for speculative purposes, but in good faith for mining the minerals specified; and that the lessee is to furnish sworn monthly reports.

By a certified mail letter dated July 31, 1957, addressed to Mr. John M. Sherman, President of the Uranium Exploration Company of California, the Acting Area Director notified the lessee of an alleged failure to comply with certain conditions of the lease. The notice stated that 30 days after receipt of the same, the lease would be de-

clared null and void. The notice further recited that a hearing would be granted the lessee to show cause why the lease should not be canceled, provided request for such hearing was received within 30 days from the receipt of the notice. By a letter dated August 31, 1957, addressed to the Phoenix Area Office from Mr. John M. Sherman, the lessee requested a hearing in order to show cause why the lease should not be canceled. The envelope enclosing this letter is postmarked Pasadena, California, September 2, 1957, 5:30 p. m. The letter and envelope are stamped received by the Phoenix Area Office, September 4, 1957. A letter from the Area Director to the lessee dated September 6, 1957, acknowledged receipt of the lessee's request for a hearing but denied the same for the reason that the request was not received within the time required by the notice to the lessee, and as prescribed in 25 CFR 186.27 (a). The letter of September 6 further stated that the formal notice of cancellation would not be executed until September 17, and invited the lessee to discuss the matter at the Phoenix office at any time prior to that date. A letter from John M. Sherman, in behalf of the lessee, to the Phoenix Area Office dated September 16, 1957, confirmed a telephone conversation of the same date and took exception to the Area Director's act of denying a hearing by reason of the fact that the request was not received in proper time. Mr. Sherman expressed his understanding in computing time that the recognized and acceptable method of computing is to exclude the day of service of receipt of a document and to commence counting the following day, by which method the 30-day period would have terminated on September 2 and, this date being a legal holiday, the period would automatically be extended to the following day. The letter of September 16 further advised that Mr. Sherman would be unable to be in Phoenix prior to September 20 and understood that any formal action taken would be delayed pending a conference on that day. A letter from the Area Director to the lessee dated September 30, 1957, confirmed a telephone conversation of that day which afforded the lessee an opportunity to submit supporting data or papers indicating any extensive planning and preliminary work accomplished on the lands, and required such evidence to be received at the area office not later than 4:30 p. m., October 3, 1957. Certain information was submitted by the lessee to the Phoenix Area Office by letter dated October 2, 1957, but that information was deemed inadequate, and a formal cancellation of the lease, effective October 4, 1957, was made by a letter of the same date to the lessee from the Acting Area Director.

The action of the Acting Area Director, canceling the lease, was appealed to the Commissioner of Indian Affairs. The Commissioner of Indian Affairs by his decision dated February 5, 1958, approved the action of the Area Director, Phoenix, Arizona, and upheld the can-

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cancellation of the lease. By this appeal the lessee contends it was improperly denied a hearing and further contends there was no violation of the due diligence and good faith requirements of the lease.

The regulations pertaining to the cancellation of a lease of tribal lands for mining purposes, contained in 25 CFR 171.27 (formerly 186.27), provide in part:

* * * the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void * * *.

Th lease (under section 6, *Cancellation and Forfeiture*), provides in part as follows:

* * * the Secretary of the Interior shall have the right at any time after thirty (30) days' notice to the lessee, specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within thirty (30) days of receipt of such notice to declare this lease null and void * * *.

The letter dated July 31, 1957, giving notice to the lessee that 30 days after the receipt of the same the lease would be declared null and void, also stated:

This action is being taken pursuant to 25 CFR 186.27 and a hearing to be held at this office will be granted the lessee to show cause why the lease should not be cancelled, provided request for such hearing is received within 30 days from receipt of this notice.

There is a variance in the language of the regulations, the lease, and the notice regarding the time when a request for a hearing must be made by the lessee. The regulation contemplates a hearing if requested within 30 days after *issuance* of a notice, whereas the lease itself provides for a hearing if requested by the lessee within 30 days of the *receipt* of a notice.

The provision of the lease is not out of harmony with the regulation but serves to fix by agreement the time of *issuance* of the notice which, by the terms of the regulation, starts the running of the 30-day period. In these circumstances, the provisions of the contract control.

The notice actually sent to the lessee required that a request for a hearing be *received* within 30 days of the lessee's receipt of the notice. This is in accordance with the accepted rule of law that where a contract requires the giving of notice within a specified period but does not prescribe the mode of service or the manner or means of delivery thereof, and such notice is sought to be served by mail, the service is not effected unless the notice comes into the hands of the one to be served within the prescribed time.¹

¹ *Johnson v. Barreiro*, 59 Calif. App. 2d 213, 138 P. 2d 746 (1943); *Wheeler v. McStay*, 160 Iowa 745, 141 N. W. 404 (1913); *Northwestern Traveling Men's Ass'n. v. Schauss*, 148 Ill. 304, 35 N. E. 747 (1893); *Shea v. Association*, 160 Mass. 289, 35 N. E. 855 (1894); *Hoban v. Hudson*, 129 Minn. 335, 152 N. W. 723 (1915).

The notice dated July 31, 1957, was received by the lessee on August 2. The lessee's request for a hearing, dated August 31, was postmarked September 2, and received at the Phoenix Area Office on September 4. September 1 was a Sunday and September 2 was Labor Day, a legal holiday. In the construction of contracts and statutes as well as in matters of practice generally, when time is to be computed from a particular day or when an act is to be performed within a specified period from or after a day named, the practice is to exclude the first day and to include the last day of the specified period.² It is generally held that when an act is to be performed within a given number of days, and the last day falls on Sunday or a legal holiday, the person charged with the performance of the act has the following day in which to comply with his obligation.³

By applying the foregoing rule to the case at hand it must be concluded that the 30-day period within which the lessee could request a hearing started to run on August 3, 1957. Since the last day of the 30-day period was Sunday, September 1, 1957, and the next day was Labor Day, a legal holiday, it follows that the last day available to the lessee for requesting a hearing was September 3, 1957. The lessee's request for a hearing postmarked September 2, 1957, was received at the area office September 4, and therefore was not received within the time prescribed. The request for a hearing was properly denied by the Area Director.

It is evident from the record that the lessee has not exercised diligence in the conduct of the prospecting and mining operations. While it is contended by the lessee that it had prepared general engineering data and performed actual core drilling and sampling of various locations, no proof of such activities has been furnished by the lessee and field inspections do not support the lessee's contentions. In the circumstances it must be concluded that the lessee has not complied with the good faith requirement of the contract.

The action of the Area Director, in canceling the mining lease of the Uranium Exploration Company of California covering designated lands of the Hualapai Indian Reservation was a proper exercise of authority, and the decision of the Commissioner of Indian Affairs affirming the action of the Area Director was a proper determination. Therefore, the decision of the Commissioner of Indian Affairs is affirmed and the appeal is denied.

ROGER C. ERNST,
Assistant Secretary.

² 52 *Am. Jur.*, Time, sec. 17. *Burnet v. Willingham Loan & T. Co.*, 282 U. S. 437 (1931); *Dutcher v. Wright*, 94 U. S. 553 (1876).

³ *Street v. United States*, 133 U. S. 299 (1890). See also Rule 6 (a), Federal Rules of Civil Procedure (28 U. S. C., sec. 232).

HENRY S. MORGAN ET AL.

A-27529

*Decided August 27, 1958***Oil and Gas Leases: Generally—Public Lands: Generally**

Where all the oil and gas lease offerors are maintaining both public domain and acquired lands offers for the same tracts of land, where no one of them is insisting that a lease must be issued only under one type of offer to the exclusion of the other but each is willing to accept either type of lease, where the Director in a carefully considered opinion found the lands to be leasable only as public domain, and where there is no obvious error in the Director's determination, there is no necessity to disturb the Director's determination.

Oil and Gas Leases: Applications

Where an offeror describes a tract of unsurveyed land by reference to non-existent corners of an unofficial survey created by projection on an 1898 map whose topographical features have been greatly altered by time and by words referring to existing features and it is not possible to identify the land applied for without consulting other maps and records, which have not been filed with the offer and are not part of the record in the case, the offer must be rejected for failure to identify the land applied for when a proper intervening offer has been filed.

Oil and Gas Leases: Applications

An oil and gas offer for unsurveyed public land which does not tie the metes and bounds description to a corner of a public land survey, as required by the pertinent regulation, is defective and earns the offeror no priority.

Oil and Gas Leases: Applications

Where a metes and bounds description of an unsurveyed tract in an oil and gas lease offer is tied to the corner of an approved public land survey and where it is possible to identify the area applied for accurately from the words of description in the offer and an accompanying map which is part of the offer, the fact that the corner used as a tie may no longer be existent does not render the offer invalid.

Oil and Gas Leases: Applications

Where an oil and gas lease offer for an unsurveyed tract of land contains a metes and bounds description consisting partly of references to natural features of topography and partly to the lines of unofficial sections created by projection, but the offer is accompanied by an up-to-date map on which is shown in great detail natural and artificial structures, contour lines, degrees of latitude and longitude, and other items, and on which the areas applied for are clearly demarcated and where the area applied for can be accurately located on the earth's surface, the metes and bounds description is not defective because it is not limited solely to lines connecting natural and artificial monuments.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Henry S. Morgan has appealed to the Secretary of the Interior from a decision dated June 5, 1957, by the Director of the Bureau of Land Management which rejected in part his noncompetitive offer

(BLM-036377) to lease for oil and gas certain lands bordering the Southwest Pass of the Mississippi River lying in Plaquemines Parish, Louisiana, pursuant to the Mineral Leasing Act of 1920, as amended (30 U. S. C., 1952 ed., sec. 226).

On the same day, January 27, 1954, on which he filed his public domain offer, Morgan also filed an offer (BLM-A 036376) to lease for oil and gas the same lands under the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., sec. 351 *et seq.*). Thereafter, on June 2, 1954, Floyd A. Wallis filed a series of offers¹ under the latter act for five of the six parcels covered by Morgan's offers. On February 2, 1955, Wallis filed a protest against Morgan's acquired lands offer. By decision dated April 26, 1955, the Supervisor, Eastern States Office, dismissed Wallis' protest. Thereupon Wallis, on May 20, 1955, filed an appeal with the Director of the Bureau of Land Management.

While this appeal was pending, Wallis, on March 8, 1956, filed offer BLM 042017 to lease under the Mineral Leasing Act of 1920 the same lands covered by his previous acquired lands application and then on March 26, 1956, filed a protest against the conflicting portions of Morgan's public land application.

In the meantime, The California Company, on December 20, 1954, had applied for permission to drill slant wells from the lands described in Morgan's offers. The permit was granted in a decision dated May 10, 1955, effective as of May 1, 1955. On August 9, 1955, Wallis filed a petition for the rescission of the permit. On August 15, 1955, Wallis asked that the proceedings with respect to this petition be consolidated with the proceedings on the acquired lands oil and gas offers.

In his consideration of Wallis' appeal from the Supervisor's decision of April 26, 1955, the Director turned his attention to the conflicting public land offers, the slant well drilling permit and other related matters.

In a decision dated June 7, 1956, the Director first denied Wallis' request for consolidation and dismissed his petition for rescission of the slant well drilling permit.²

The Director then determined that all the lands in conflict between Wallis' and Morgan's applications were public lands and held that the acquired lands applications of both were subject to rejection. He next determined that Morgan's public land offer BLM 036377 was defective and therefore subject to rejection to the extent of its conflict with Wallis' public land application BLM 042017.

¹ BLM-A 037435 through BLM-A 037439.

² Wallis has filed an appeal from this decision, as modified by later decisions of June 28, 1957, and August 8, 1957 (*Floyd A. Wallis, The California Company, A-27547*) which will be the subject of a separate decision.

August 27, 1958

After ruling upon other matters, which are not involved in this appeal, the Director stated: "* * * all parties are given 30 days in which to show cause, and to submit evidence and briefs, if they desire, why action should not be taken in accordance with the views expressed herein" (p. 34).

About a year later, in a decision dated June 5, 1957, the Director ruled that neither party had shown cause with respect to offers BLM-A 036376 and BLM-A 037435 through 037439, that these offers were rejected and the cases closed. He then went on to examine the conflict between the public land offers of Wallis and Morgan and held that as to the extent of the conflict Morgan's offer 036377 must be rejected.

Thereupon, on August 5, 1957, Morgan took this appeal to the Secretary. On August 23, 1957, in a letter to the Director, Morgan said that the decision of June 5, 1957, incorrectly closed the cases as to the acquired lands applications because there had never been a final disposition of these offers from which an appeal to the Secretary could have been taken and requested that the appeal involving the acquired lands offers pending before the Director be disposed of so that the parties could appeal to the Secretary. In a letter to the Director, dated September 6, 1957, Wallis said that the decision of June 5, 1957, should be modified as to his acquired lands offers but that the case was properly closed as to Morgan's conflicting offer.

Then, on September 24, 1957, T. R. Strom filed with the Secretary a document entitled "Protest, Request For Exercise of Supervisory Authority and Motion To Consolidate and To Intervene" in which he stated that he had filed noncompetitive public land offers to lease for oil and gas BLM 042877, 042878, and 042880 on July 10, 1956, and BLM 043259, 043260 and 043261 on October 16, 1956, for the same lands covered by Wallis' and Morgan's applications,³ that their applications are defective, and that his are proper. He requested that the entire matter should be disposed of in this appeal.

On November 4, 1957, Morgan filed his brief on appeal. At the same time he filed a motion for the exercise of supervisory jurisdiction by the Secretary over the conflict between his and Wallis' acquired lands applications and asked that it be consolidated with the public lands appeal and the whole matter decided at one time.

On January 3, 1958, Strom filed a brief in support of his public land offers and a statement that on September 25, 1957, he had filed acquired lands offers BLM-A 045283 and 045284 for the same lands. Strom states that he, too, is willing to have all the issues settled at one time.

³ Strom later stated in a brief filed on January 3, 1958, *infra*, that offers BLM-042880 and 043261 described land not in conflict with the Morgan and Wallis offers.

On February 6, 1958, Wallis filed his brief in which he asks the Secretary to consider his, but not Morgan's, acquired lands offer in the exercise of the Secretary's supervisory authority.

Thus there are now three parties before the Secretary each of whom is asserting the priority of his public land or acquired land offer. Not one of the applicants has taken a definitive position on whether the lands applied for are of the one type or the other and each is apparently willing to accept a lease under either statute. Furthermore, the Director in an exhaustive and carefully reasoned decision has determined that the lands involved are leasable only as public lands. Although all the parties are maintaining both types of offers, not one of them is insisting that the Director's determination is in error. For example, Wallis has not appealed from the Director's decision which rejected Morgan's public land offer and remanded his own public land offer for adjudication in accordance therewith. Morgan has appealed from the Director's decision, but on the ground that his public land offer was erroneously rejected. It is true that in Morgan's Motion and Brief in Support of Motion for Exercise of Supervisory Authority, etc., filed on November 4, 1957, he says that the tracts applied for should be held to be acquired lands. His arguments, however, are perfunctory and he makes no serious attempt to point out error in the extensive and careful analysis on which the Director based his determination that the land is leasable only as public domain. Finally, Strom makes no objection to the Director's determination as to the status of the land.

I have considered the Director's decision carefully. While matters shrouded in the vagaries of ancient events and the turbulence of the river and its shores are never free from some doubt, I find no obvious error in the Director's determination. In these circumstances, I see no reason to disturb the Director's finding that the lands involved are leasable under the Mineral Leasing Act of 1920, as amended, and not under the Mineral Leasing Act for Acquired Lands.

With this conclusion before us, we may now dispose of certain procedural matters. First, Strom's request to intervene in these proceedings is granted. Next, the several requests for the exercise of supervisory authority by the Secretary are allowed.

Having determined that the lands are to be leased as public lands, I must therefore reject all the acquired lands applications which have been filed for these lands. This disposes of offers BLM-A 036376 (Morgan), BLM-A 037435-037439 (Wallis), and BLM-A 045283-045284 (Strom).

Turning now to the substance of the dispute, I find that the Director rejected Morgan's public land offer on the ground that it failed to connect the metes and bounds description of the unsurveyed lands

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described therein with a corner of the public land surveys and that the description contained in his offer is insufficient under the applicable regulation to identify the land. The Director further found the description in Wallis' offer 042017 to be sufficient for that purpose. Strom's offers were not before the Director.

The lands involved in this appeal consist of several tracts of unsurveyed land on the narrow tongues of land which are the left and right banks of the Southwest Pass of the Mississippi River into the Gulf of Mexico. The closest public land survey covers fractional Ts. 24 S., Rs. 30 and 31 E., Louisiana Meridian, a survey of the lots along the banks of the pass made in 1836 by G. F. Connelly and approved in 1842. At that time the mouth of the pass was a considerable distance north of where it now is and the lands applied for were not then in existence. However, the United States Army Engineers have for many years been concerned with maintaining and improving the channel into and through the pass and there are some detailed maps of the area which it has prepared.

The sections of the Mineral Leasing Act, as amended, dealing with leasing public lands for oil and gas have no provision relating to the description of unsurveyed lands.⁴ The pertinent oil and gas regulations in effect when Morgan filed his offer provided as follows:

* * * Each offer must describe the lands * * * if not surveyed, by a metes and bounds description connected with a corner of the public land surveys by courses and distance * * *. 43 CFR, 1953 Supp., 192.42 (d).

An offer will be rejected and returned to the offeror, and it will confer no priority if it is not completed in accordance with the regulations in Parts 191 and 192 and the instructions printed on the lease form * * *. *Id.*, 192.42 (g).

The lease form (Form 4-1158, Fourth Edition (September 1943)), which also constitutes the offer, provided in General Instruction 9:

The offer will be rejected and returned to the offeror and will afford the applicant no priority if: (a) The land description is insufficient to identify the lands * * *

and in Special Instructions, Item 2:

* * * The lands requested * * * should be described * * * if unsurveyed, by metes and bounds connected by courses and distance with some corner of the public land survey. Where possible the approximate legal subdivisions of unsurveyed lands should be stated.

A footnote pointed out that items in the special instructions were numbered according to the items on the offer form. Item 2 is "Land requested."

⁴ As originally enacted and as later amended there were very specific provisions relating to the identification of unsurveyed lands for which a permit to prospect for oil and gas was sought. Sec. 13, act of February 25, 1920; 41 Stat. 441, 49 Stat. 674.

Morgan's descriptions are made in terms of subdivisions of sections as shown on a map of part of the Southwest Pass prepared from a survey made under the direction of a board of United States Engineers in March and April, 1898, and the shorelines of the bays and banks of the Southwest Pass. The sections referred to are not those of an official survey made upon the ground, but are projections of an unofficial survey. (Applicant's Brief, pp. 11-13.)

Wallis argues that the descriptions are insufficient to identify the land because they refer to topographic features which cannot be located on the map. As Wallis points out (Appellee's Brief, pp. 4-6), the tracts Morgan has applied for cannot be located solely from the map he furnished with his application. However, if Morgan's descriptions are read in the light of existing topographic features, they apparently become more meaningful. In any event, the Director stated in his 1956 decision and quoted in his 1957 decision:

Although the description of parcels I through V of BLM 036377 are not so accurate that an average person could identify the land, it was the opinion of the Office of Cadastral Engineers that the identical descriptions in BLM-A 036376 were identifiable metes and bounds descriptions sufficient for one familiar with metes and bounds descriptions to identify the land as common engineering and surveying practices demand; consequently, the only vital question is whether or not the land requested is connected with a corner of the public land surveys.

However, before the Office of Cadastral Engineers was able to satisfy itself that the descriptions in Morgan's acquired lands offer BLM-A 036376 were sufficient to identify the land applied for, it apparently had to obtain other maps. As late as March 14, 1955, a note from that office read:

A map showing the detail of the 1898 map referred to in the application and later survey data is found in BLM-038189 (now on my desk). *This map is useful in locating the lands described in this area.* Mr. Meath was in a few days ago and said that *he would supply us* with more copies of this map & also copies of a map by Charles Ellet Jr. dated 1851 referring to Wagner's Island.

In a letter dated March 1, 1955, from an official in the Corps of Engineers to the Director, it was stated:

Reference is made to your letter, without date, stating that Henry S. Morgan, Washington, D. C., has applied for an oil and gas lease for the lands described in his application, No. BLMA 036376, and requesting information as to the matters listed.

The District Engineer, Corps of Engineers, New Orleans, Louisiana, reports that the descriptions in the application are insufficient to enable him to identify the areas on the maps in his office. It appears, however, that a portion of the lands described in this application are included in applications Nos. BLM-A 037435 to BLM-A 037439, inclusive, filed by Mr. Floyd A. Wallis on 2 June 1954.

A map by Charles Ellet, Jr., dated 1851, can not be located in the files of the District Engineer or in this office.

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It is suggested that the applicant be requested to furnish a map showing the areas included in the description accompanying his application.

Sometime thereafter this difficulty was overcome for in a letter dated July 1, 1955, the Corps of Engineers stated that it had no objection to the issuance of a lease to Morgan, and went on to say that:

The areas described in this application are the same as the areas described in the application filed by the California Company on 20 December 1954, No. B. L. M. A. 039136, for a permit to drill slant wells. Parts of the areas described in this application are also described in the applications filed by Frank A. Willis [Wallis] on 2 June 1954, Nos. B. L. M. A. 037435 through B. L. M. A. 037439, as shown on the accompanying map. The areas shown in green and blue on the map are not under the jurisdiction of the Department of the Army.

Although it is clear that the land applied for by Morgan has been identified and that there is now little dispute as to the areas sought by the several applicants, it does not follow that the descriptions in Morgan's acquired lands and public land applications were sufficient to identify the land when they were filed. Morgan filed no amended description to any of his applications prior to the time Wallis filed his conflicting ones. Each application must be judged on its own merits and by its own record. If it is defective, it cannot be cured by reliance on information brought to the Department's attention by third parties, or by the applicants themselves, in other cases.⁵

Therefore, Morgan's public land application must be judged upon the basis of the description it contained when it was first filed. The topography of the land as shown on the 1898 map, which he submitted, has undergone great changes and there is no relation between the lands shown on the map and the topographic items referred to by Morgan. On the basis of the language in Morgan's descriptions and the map which accompanied his application, I find that the original inability of both the Army Engineers and the Cadastral Engineers to locate the land applied for, which was overcome only by maps filed

⁵ The appellant has recognized the correctness of this view and set it forth in his "Reply of Appellee to Appellant's Brief in Rebuttal" filed on September 28, 1955, in *Wallis v. Morgan*, BLMA-036376, 037435-037439, in the following language:

"Appellee desires to emphasize, at the outset, that his rights as an applicant for an oil and gas lease are to be determined solely on the basis of the record existing with respect to appellee's own application. What may have been done by an applicant in another case can have no effect on the validity of appellee's application. This would be true even if appellee himself had taken some action in another case. It is all the more true when the action is taken by a third party.

"It is immaterial that the third party in this instance was appellee's optionee, The California Company. Appellee's optionee is a stranger to the present proceeding and, in any event, the action was taken in another case. Appellee's rights are governed solely by the record in this case." (Pp. 1-2.)

* * * * *

"In this connection, it is to be noted that appellee has not undertaken to furnish to the Bureau any maps or material other than that accompanying his application at the time of its filing. * * *." (P. 3.)

by a third party in another case, is easily understandable. This description, which is a composite of non-existent corners depicted upon an unofficial map made by projection and some existing points and features of the banks lining the Southwest Pass which are not shown upon the map, is, in my opinion, insufficient to identify the land applied for. The map accompanying the offer does not show the tracts applied for. The corners referred to as parts of the metes and bounds descriptions cannot be found upon the ground nor can they be located by reference to the 1898 map and the other parts of the description.

Although with the help of up-to-date maps of the area upon which early surveys and projections have been transposed it becomes possible to determine to some degree the lands covered by Morgan's public land application, this reverse process does not make Morgan's application proper but instead emphasizes its deficiencies and demonstrates the ease with which Morgan could have made his description proper. Therefore, it is my conclusion that Morgan's description is insufficient to identify the land applied for.

An offer which contains a land description insufficient to identify the land applied for earns the offeror no priority and must be rejected.⁶

Furthermore Morgan's metes and bounds descriptions of the tracts in his public land offer are defective because they are not tied by course and distance to a corner of the public land survey. The language of the regulation is clear. An offer for unsurveyed land must describe it "by a metes and bounds description *connected with a corner of the public land surveys* * * *" (43 CFR, 1953 Supp., 192.42 (d); emphasis added). The requirement that a tie be made is as definite and as mandatory as the requirement for a metes and bounds description.⁷ There is no valid basis for asserting that while the latter is mandatory, the former is not.

The appellant argues strongly that identification without a tie is sufficient. This argument is not only contrary to the plain language of the regulation, but is rendered ineffective by the finding that Morgan's descriptions, standing by themselves, are insufficient to identify the tracts applied for.

Therefore Morgan's public land application is also defective, and was properly rejected, because the metes and bounds descriptions were not connected with a corner of the public land surveys by course and distance.

⁶Instruction 9, Lease form 4-1158, Fourth Edition, 43 CFR, 1953 Supp., 192.42 (g); *Sidney A. Martin et al.*, 64 I. D. 81, 86 (1957).

⁷That the requirement that an oil and gas offer for unsurveyed public lands describe the lands applied for by metes and bounds is mandatory is well established: *John W. Luce*, A-26261 (February 4, 1952); *Margaret Prescott*, 60 I. D. 341 (1949); *H. L. Rath et al.*, 60 I. D. 225 (1948).

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Turning now to the next application in point of time, Wallis' BLM 042017, we note again that the Director found that Wallis' description is sufficient to identify the land. (Decision dated June 5, 1957, page 2.) Wallis described the parcels he applied for by reference to corners of the same unofficial survey that Morgan used, combined with references to existing physical features of the land, and by referring to a recent map of the area prepared by the Corps of Engineers on which the tracts applied for are clearly depicted. He submitted a copy of the map with his application and made it part thereof. This map, which is in the scale of 1" equals 800 feet, shows in great detail the topography of the area, the location of dikes, jetties, and buildings, parallels of latitude, meridians of longitude, contour lines, the sections surveyed by Connelly, and the approximate subdivisions of the unsurveyed areas. The map is so detailed and the areas applied for so plainly shown that there does not seem to be the slightest doubt that the boundaries of the several tracts could be located on the ground.

Neither Morgan nor Strom so contend, but for different reasons argue that Wallis' descriptions are inadequate. Morgan says that Wallis' description is no more adequate than his because Wallis' metes and bounds description is also in terms of the unofficial section numbers shown on the Welman Bradford grid plus a connection on paper to the southeast corner of section 3, T. 24 S., R. 30 E., of the approved plat of Connelly's survey. Morgan contends that a connection to a nonexistent corner is unnecessary and that identification of the land is sufficient. Morgan's arguments have been considered above.

Strom, on the other hand, argues that Wallis' descriptions do not satisfy the regulation because they are not connected to a proper public land corner and because they do not properly describe the land by metes and bounds.

There is no question but that the corner of the Connelly survey Wallis used as a point of connection is nonexistent on the ground. However, the Connelly survey is the only official survey which has been made of the area it covered and it has never been set aside. Strom contends that a connection must be made to an existing corner which can be located on the earth's surface. He has made such a connection in his application, although, to a corner 14 miles away from the land applied for. To determine whether a tie to an actual monument 14 miles away is better than one to a closer, nonexistent, but surveyed corner we must examine the reason for the regulation. The reference here to the corner used by Wallis as nonexistent means it is nonexistent only in the sense that the physical monument can-

not be found, not that it never existed because, in fact, the corner has been established in a survey and the plat of survey approved.

It must be borne in mind that the regulation is intended to aid in the identification of the land applied for. It has nothing to do with the land which has been surveyed and is used as a reference point. If the connection aids the land office and other applicants in locating the land applied for, it has fulfilled its function. The conditions existing on the surveyed land have no relationship to the land applied for other than to aid the land office and other applicants in locating the latter tracts. Without a tie to a public land corner, a metes and bounds description of an unsurveyed tract could be extremely difficult to locate, even though the description was accurate. But a tie having been made to a public land corner, whether the monument exists or not it is possible to approximate the site of the unsurveyed area.⁸ From then on the propriety of the description is dependent upon its own accuracy and completeness.

If the description is adequate, those concerned can locate the tract both for purposes of record keeping and for physical location. Even if the courses and distances from the public land corner to the true point of beginning were inaccurate, the general rule is that natural and artificial monuments in the metes and bounds description would control over the former. *Ernest W. Sawyer, Jr.*, A-26573 (January 27, 1953). Here the tie to the corner used by Wallis satisfies the intention of the regulations because it limits the location of the tracts applied for and facilitates their future identification. Accordingly, it is my opinion that the tie to a public land survey corner made by Wallis is not defective merely because the corner may be nonexistent, if the rest of the description is sufficient to locate the tracts applied for accurately.

This conclusion brings us to Strom's contention that Wallis' description is inadequate as a metes and bounds description because it relies in part upon nonexistent lines of the Welman Bradford survey, rather than entirely upon references to natural and artificial monuments. While there is no question but that a metes and bounds description such as Strom urges is entirely adequate, it does not follow that Wallis' is insufficient. As has been pointed out before, Wallis at-

⁸ The purpose served by the required tie is illustrated in this case. If Morgan had tied his description to the same corner that Wallis used, an apparent conflict between their applications would at once have become evident without going beyond the confines of the applications. As it was, it was necessary to resort to extrinsic evidence to attempt to ascertain the location of Morgan's tracts before the conflict with Wallis' application became apparent.

The Bureau and the public cannot be expected to assume the burden of having, in effect, to locate land applied for on the ground in order to ascertain conflicts merely because an applicant chooses not to tie his metes and bounds description to a public land survey corner.

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tached to and made a part of his offer an up-to-date detailed map of the area compiled by the Corps of Engineers, on which the areas he applied for were clearly marked. There has been no suggestion that the map Wallis used is in any way inaccurate. From the various items on the map, such as natural features and designations of latitude and longitude, combined with the words of description in the offer and the shading of the areas applied for on the map, it seems that the location of these tracts has been made with extreme accuracy.

The traditional concept of a metes and bounds description which Strom says is the only acceptable one is one that arose when it was necessary to describe lands in unsurveyed and unmapped areas. In such regions it is easy to understand how descriptions tied to projections of public land surveys were held to be inadequate. However, when an area has been surveyed by another agency of the United States Government and an accurate and detailed map of the area is available, there is no reason not to take advantage of it in designating portions of the mapped area for which the offeror is applying. It seems to me that the marking out of a tract on a map as detailed as the one Wallis used is no less useful than relying solely upon courses and distances to describe the same land. Any line used as part of a description can easily be converted into courses and distances and in addition its location checked by reference to other features shown upon the map. Since there should be no difficulty in locating the tracts applied for, the purpose of the regulation has been satisfied.

Accordingly, I conclude that the objections raised by Morgan and Strom to Wallis' application are without merit.⁹ It follows that the action of the Director in rejecting Morgan's application BLM 036377 to the extent of its conflict with Wallis' application BLM 042017 is correct. Since Strom's applications are junior to Wallis', they will be disposed of when final action is taken on Wallis' application. *John E. Miles*, 62 I. D. 135, 140-141 (1955).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

⁹Strom in a supplemental brief refers to a recent decision, *Duncan Miller*, A-27535 (March 10, 1958), as supporting his view that Wallis' tie to a non-existent corner renders his application defective. In the *Miller* case the application was held defective because it referred to a corner of four townships which in fact never existed on any plat. Wallis' corner must be accepted as having been established and shown on an approved plat; a different situation.

DUNCAN MILLER**A-27673***Decided August 29, 1958***Rules of Practice: Appeals: Statement of Grounds**

A mere statement by an appellant that his application was rejected by an erroneous interpretation of law, without more, is insufficient to constitute a statement of reasons for his appeal.

Rules of Practice: Appeals: Statement of Grounds

An appeal to the Director or to the Secretary of the Interior will be dismissed where the appellant fails to file a statement of the reasons for the appeal within the time required by the rules of practice.

Rules of Practice: Appeals: Timely Filing

The late filing of a statement of reasons for an appeal to the Secretary of the Interior cannot be waived where the record shows that the statement was not mailed to the Secretary until after the expiration of the period of time within which the statement was required to be filed, even though the statement was received within the 10-day period of grace stipulated in 43 CFR 221.92 (b).

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Duncan Miller has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated January 27, 1958, which affirmed a decision of the manager of the Los Angeles, California, land office, dated December 14, 1955, rejecting his noncompetitive oil and gas lease offer Los Angeles 0137156.

The Director's decision allowed a right of appeal to the Secretary of the Interior. The decision pointed out that if an appeal was taken the notice of appeal must be sent to the Director in time to be received within 30 days from receipt of notice of the Director's decision; that the appeal must be supported by a statement of reasons for the appeal; that if the statement of reasons did not accompany the notice of appeal, it must be sent in time to be received by the Secretary within 30 days after the notice of appeal was received by the Director; and that strict compliance must be made with the Department's rules of practice, 43 CFR, 1956 Supp., Part 221. An information sheet containing the pertinent rules of practice accompanied notice of the Director's decision.

A registry receipt card in the record shows that notice of the Director's decision was received by the appellant on March 14, 1958. On April 7, 1958, a document entitled "Notice of Appeal" was received by the Director which stated that:

Appeal is hereby made for the above case. A five dollar fee is enclosed, attached herewith.

It is contended that the application was rejected by an erroneous interpretation of the law.

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On May 12, 1958, a statement of the reasons for the appeal was received from the appellant.

Effective March 22, 1958, the Department's rules of practice were relaxed as to filings required to be made after that date. 43 CFR 221.33 was amended to read as follows:

§ 221.33 *Statement of reasons, written arguments, briefs.* If the notice of appeal did not include a statement of the reasons for the appeal, such a statement must be filed in the office of the Secretary (address: Secretary of the Interior, Washington 25, D. C.) within 30 days after the notice of appeal was filed. Failure to file the statement of reasons within the time required will subject the appeal to summary dismissal as provided in § 221.98, unless the delay in filing is waived as provided in § 221.92. In any event the appellant will be permitted to file in such office additional statements of reasons and written arguments or briefs within the 30-day period after he filed the notice of appeal (23 F. R. 1930.)

Section 221.92 was amended to read in pertinent part as follows:

§ 221.92 *Filing of documents.* (a) A document is filed in the office where the filing is required only when the document is received in that office during the office hours when filing is permitted and the document is received by a person authorized to receive it.

(b) Whenever a document is required under this part to be filed within a certain time and it is not received in the proper office, as provided in paragraph (a) of this section, during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and *it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed.* * * *. (21 F. R. 1930; italics supplied.)

It should first be pointed out that the document entitled "Notice of Appeal" received on April 7, 1958, can only be considered as a notice of appeal. The statement that "It is contended that the application was rejected by an erroneous interpretation of the law" cannot be regarded as a statement of the reasons for the appeal. *Duncan Miller*, 65 I. D. 290 (1958); *Duncan Miller, Leland K. Whittier et al.*, A-27623 (July 28, 1958). Therefore, the appellant was required to file a statement of reasons on or before May 7, 1958. The statement of reasons received on May 12, 1958, was not timely filed.

The postmark on the envelope containing the appellant's statement of reasons shows that it was mailed on May 9, 1958, from Los Angeles, California. As the period within which the appellant was required to file the statement of reasons ended on May 7, 1958, it is clear that the failure to file the statement of reasons on time cannot be waived under the provisions of 43 CFR 221.92 (b), as amended, because the statement was not transmitted (mailed) to the Secretary's office before the end of the period in which it was required to be filed.

The rules of practice provide that an appeal to the Director or to the Secretary will be subject to summary dismissal:

(a) If the statement of the reasons for the appeal is not included in the notice of appeal and is not filed within the time required. 43 CFR, 1956 Supp., 221.98.

Accordingly, dismissal of the appeal is required. *Gerhard Even-son*, 63 I. D. 331 (1956).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the appeal is dismissed.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF C. H. WHEELER MANUFACTURING COMPANY (ECONOMY PUMPS, INC., DIVISION)

IBCA-127

Decided September 12, 1958

Contracts: Damages: Liquidated Damages—Contracts: Subcontractors and Suppliers

Where a supply contractor under a contract for the furnishing of motor-driven pumping units failed to submit for Government approval within the time prescribed by the contract the assembly and construction drawings and design data for the motors; delayed placing its order for the motors with its supplier until after the prescribed time for submission of the drawings and design data; failed to call the supplier's attention to the deadlines; after receiving the drawings from its supplier delayed submitting them to the Government, and failed to show that production of the motors by the supplier was delayed by an act of the Government, the contractor has not met the burden of proving that it is entitled to an additional extension of time based on an excusable delay under the delays-damages clause.

Contracts: Subcontractors and Suppliers

The failure of a contractor's supplier to prepare promptly necessary motor drawings and design data required for the performance of a supply contract would not alone be sufficient to relieve the contractor of a contractual obligation to submit such drawings and design data within the prescribed periods of time, or to constitute an excusable cause of delay.

BOARD OF CONTRACT APPEALS

C. H. Wheeler Manufacturing Company (Economy Pumps, Inc., Division) has filed a timely appeal from findings of fact of the contracting officer, dated July 9, 1957, which denied in part its request for an extension of time in the performance of Contract No. 14-06-D-2191 with the Bureau of Reclamation.

This appeal will be determined on the record, since neither party has requested a hearing. At the request of the contractor, however,

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an informal conference was held before the full Board in Washington, D. C., May 13, 1958.

The contract was entered into on October 18, 1955, and was on U. S. Standard Form No. 32 (Nov. 1949 Edition), for the procurement of supplies. It provided for the furnishing of motor-driven pumping units under Schedule No. 2 for South Davis Pumping Plant, Davis Aqueduct, Weber Basin Project, Utah, within 365 calendar days after receipt of notice of award. The contractor received such notice on October 20, 1955. This established October 19, 1956, as the contract shipping date.

The pumps were fabricated in the contractor's plant, but the motors, one of 500 h. p. and the other of 300 h. p., were ordered from the General Electric Company. Paragraph B-4 (a) of the specifications provided that assembly and construction drawings should be submitted to the contracting officer for approval "within thirty (30) calendar days after date of receipt of notice of award of contract and before beginning manufacture." However, the contractor did not place the order for the motors until November 22, 1955, and did not complete the submission of the initial drawings for them until April 20, 1956. This delay of approximately 5 months beyond the stipulated date resulted in half of the contract performance period having expired before the last of the initial motor drawings was submitted. Paragraph B-4 (c) of the specifications provided that certain specified design data should be furnished "not later than ninety (90) calendar days after date of receipt of notice of award of contract." Despite four separate requests by letters, the first dated March 23, 1956,¹ the complete design data for the motors was not submitted by the contractor to the Bureau until August 2, 1956. Thus, the motor design data was more than 8 months late, and less than 2 months of the contract performance period remained unexpired when it was submitted.

The contractor informed the contracting officer by letters dated October 5, 1956, and January 29, 1957, that completion of the pumps was being delayed because of the late delivery of motors from its supplier, the General Electric Company.

The pumping units were shipped by the contractor to the Bureau on March 21, 1957. For the resulting delay of 153 days in their delivery the contractor asked for an extension of 152 days of the contract period, in order not to have to pay \$20 for each day's delay which was not excused under the terms of clause 11 of the General Provisions of the contract, as modified and supplemented by paragraphs A-9, B-9 and B-10 of the specifications.

¹ The other letters were dated May 3, June 7, and July 12, 1956.

The contracting officer in his findings allowed 46 days because the Government exceeded by that period the 30 days allowed by paragraph B-9 of the contract for the approval of drawings and test data. Upon the submission of the design data, the Government had raised an objection to the adequacy of the starting torque for the 500 h. p. motor, as disclosed by that data, by letter dated August 18, 1956, but was convinced by the contractor that the starting torque was in fact adequate and withdrew its objections by letter dated October 15, 1956, which was received by the contractor two days later. Thus, 76 days elapsed between the submission and approval of the design data in so far as the 500 h. p. motor was concerned. No excessive delay occurred in connection with the 300 h. p. motor since the data for it was impliedly approved by the letter of August 18.

The contractor now contends that it is entitled to an additional extension of time because it had completed manufacture of the pumps well in advance of the delivery date of the contract, but could not complete their assembly and testing until the motors were received from the General Electric Company. The contractor attributes the late delivery of the motors to the delay in securing the approval by the Bureau of Reclamation of the design of the starting torque of the 500 h. p. motor. The contractor contends that as a result the motors lost their place in the General Electric Company's production schedule, orders with a higher priority rating taking precedence over them, and that, consequently, the motors had to be rescheduled for production. The 500 h. p. motor was received by the contractor on January 15, 1957, but it was not until March 4, 1957, that the 300 h. p. motor was shipped to it by the General Electric Company.

Under the terms of the contract, a cause of delay to be excusable had to be "beyond the control and without the fault or negligence of the contractor." Such causes specifically included defaults of subcontractors due to any excusable cause, unless the contracting officer determined that the materials or supplies to be furnished under the subcontract were procurable in the open market. It was also specifically provided that if performance was delayed by operations of the national priorities or material allocation system, the time for shipment would be extended to compensate for such delay.²

It is well settled that in order to avoid the assessment of liquidated damages for failure to furnish supplies on time, the appellant has the burden of showing that the cause of delay was excusable, and that it was not responsible, of course, for the delay.

To buttress its claim, the contractor after its informal conference with the Board submitted a letter dated July 8, 1958, from its

² Clause 11 of the General Provisions, as modified and supplemented by paragraphs A-9, B-9 and B-10 of the specifications.

September 12, 1958

supplier, the General Electric Company. The letter stated that it was the company's policy in 1956 with reference to the submission of motor design data that the engineering and manufacturing sections should not do any work without full authorization from its customer. Hence, until the acceptance and approval of the design by the Bureau of Reclamation, no work was performed.

The letter stated also that as prints were approved on this type of order, the General Electric Company scheduled the manufacturing of the unit as near as possible to provide the shipment required by the customer, but that the company was not able to do this in all cases, due to loading already in schedule and commitments already made.

In its appeal letter to the Board dated August 9, 1957, the contractor stated that the findings of fact of the contracting officer did not give full consideration to the necessity of rescheduling the electric motors within the plant of the General Electric Company after the matter of starting torque was resolved. This contention is not supported by the evidence.

In the first place, it is plain that the basic cause of the 107 days of delay not excused by the contracting officer was the lateness of the contractor in submitting, first, the assembly and construction drawings, and, second, the design data. The time so lost is more than enough to account for all of the 107 days of unexcused delay. There is no showing that the delay in preparing and submitting the drawings and design data for approval by the Government was due to any excusable cause under the contract. It appears that the contractor relied upon the supplier to prepare both the motor drawings and the design data, but this alone would not be sufficient to relieve the contractor from its contractual obligation to submit them within the prescribed 30- and 90-day periods, or to constitute an excusable cause of delay.³ Indeed, it is not even shown that the contractor called these deadlines to the attention of the General Electric Company when it placed its order for the motors. Moreover, a good part of the time so lost is directly attributable to the contractor itself. For example, it did not place the order for the motors until after the date for submission of the drawings had passed. Similarly, it appears to have waited for more than 2 months after receiving the drawings from the General Electric Company before submitting them to the Bureau. Thus, it cannot be found that the delay in submitting the drawings and design data was beyond the contractor's control and without its fault or negligence.

³ *Woodhull Construction Company, ASBCA No. 3628 (May 6, 1957).*

In the second place, there is no ground for considering that the time consumed in resolving the starting torque problem delayed the completion of the motors by more than the 46 days allowed by the contracting officer. The contractor advised its supplier by a letter dated October 18, 1956, that the design data had been approved, and received the 500 h. p. motor less than 3 months later. This does not seem a particularly long period for the obtaining of such a piece of equipment, and compares favorably with the 12 to 16 weeks which, at the conference before the Board, the contractor's vice president gave as his estimate of a normal time. Moreover, the 300 h. p. motor, which was not involved in the starting torque problem, was not completed until considerably later than the 500 h. p. motor. Hence, it does not appear that the action of the Government in taking longer than 30 days to approve a reduced starting torque for the 500 h. p. motor was the cause of any part of the unexcused 107 days of delay.

In its letter of July 8, 1958, to the contractor, the General Electric Company also stated that in 1956 it was producing over 200 synchronous motors—the type of motor here involved—under Government contracts. This does not in itself amount to a showing that the fabrication of either of the two units to be furnished under the contract involved in the present appeal was slowed down by reason of the national priorities or material allocation system. On the present record it cannot be said that any part of the delay in completion was due to the operations of that system.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer is affirmed.

THEODORE H. HAAS, *Chairman*.

I concur:

HERBERT J. SLAUGHTER, *Member*.

I concur in the result:

WILLIAM SEAGLE, *Member*.

WITHDRAWAL FOR ACCESS PURPOSES UNDER THE COORDINATION ACT (60 STAT. 1080; 16 U. S. C. SEC. 661 ET SEQ.)

Withdrawals and Reservations: Authority to Make

Public lands may be withdrawn as a conservation measure under the Coordination Act to afford public access to hunting and fishing areas.

September 19, 1958

TO THE ACTING DIRECTOR, BUREAU OF SPORT FISHERIES AND WILDLIFE

The question is whether the Coordination Act of August 14, 1946, 60 Stat. 1080, 16 U. S. C. section 661 *et seq.*, authorized withdrawals of public lands for the purpose of providing access by the public to hunting or fishing areas. This act clearly stated at the time this question was raised:

In order to promote effectual planning, development, maintenance, and coordination of wildlife conservation and rehabilitation in the United States, * * * the Secretary of the Interior, through the Fish and Wildlife Service, is authorized (a) to provide assistance to, and cooperate with * * * State, and public * * * agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, * * * in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting areas, * * *.

The amendatory act of August 12, 1958, it may be noted, has since specifically authorized easements across public lands for access to public shooting and fishing areas. See Public Law 624, 85th Cong., (72 Stat. 563), and S. Rept. 1981, 85th Cong., 2d sess., p. 5.

Among the various statutory authorizations available for the use of the Secretary of the Interior in this situation is the Pickett [Withdrawal] Act of June 25, 1910, 36 Stat. 847, 43 U. S. C. sec. 141, which reads:

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. [Italics supplied.]

This authority has been delegated to the Secretary by the President. E. O. 10355, May 26, 1952, 17 F. R. 4831, 43 U. S. C. sec. 141 note.

It may be of interest to mention the fact that there were a number of Executive acts establishing reservations for wildlife conservation purposes even before the Pickett Act authorization. *United States v. Midwest Oil Co.*, 236 U. S. 459, 470 (1915).

The problem of conserving wildlife is not, of course, simply one of curtailing destruction. It includes the problem of maintaining a balanced wildlife economy by harvesting or otherwise disposing of surpluses. In either situation, the Federal powers usually are adequate. See, for examples, *Missouri v. Holland*, 252 U. S. 416 (1920), and *Hunt, Governor of Arizona, et al. v. United States*, 278 U. S. 96 (1928). I wish to emphasize the fact that harvesting of surplus wildlife by controlled hunting, fishing, or other methods, is a recognized attribute of conservation. This is established in authoritative writings on the subject. See, for examples, *Transactions of the*

6th North American Wildlife Conference * * * (1941), p. 377; *Transactions of the 8th North American Wildlife Conference* * * * (1943), p. 23; *Transactions of the 10th North American Wildlife Conference* * * * (1945), pp. 152-153; Leopold, *Game Management* (1936), pp. 16-17; Allen, *Our Wildlife Legacy* (1954), pp. 116, 122, 128, 133; Lagler, *Freshwater Fishery Biology* (1956), p. 287; Allen, *Pheasants in North America* (1956), pp. 263, 462-463.

Under the circumstances, it is unrealistic to argue that authority did not exist under the Coordination and related acts for the Secretary to set aside public lands for the purpose of permitting access to hunting or fishing areas. Compare Op. Sol. M-36519, 65 I. D. 305 (1958). Accordingly, the memorandum of the Associate Solicitor M-36442, July 9, 1957 [unreported] is hereby withdrawn and superseded.

ELMER F. BENNETT, *Solicitor*.

APPEAL OF WISMER & BECKER ELECTRIC, INC.

IBCA-136

Decided September 22, 1958

Contracts: Specifications

A specification of a Government construction contract which enumerates the individual components of capacitor equipments and requires the contractor to install "the complete capacitor equipments" is not ambiguous, so far as the contractor's duty to assemble the individual capacitor units and associated equipment into Var-Blocks, is concerned.

Contracts: Interpretation

A contractor who is aware of an ambiguity in a Government construction contract with respect to the assembly of individual capacitor units and associated equipment into Var-Blocks is not entitled to the benefit of the rule of interpretation *contra proferentem*, which would require that the provision be construed against the Government which had drafted it. Having discovered the ambiguity, the contractor is bound to make due and proper inquiry in the effort to secure its clarification. The contractor cannot confine the inquiry to the supplier of the capacitor equipment, especially when it has been put on notice that an authoritative interpretation can be obtained only from the main office of the contracting bureau.

BOARD OF CONTRACT APPEALS

Wismer & Becker Electric, Inc., has appealed from a decision of the contracting officer involved in the entry by him of Order for Changes No. 2, dated May 16, 1957, by which he deleted from the contract the assembly of capacitor units, also known as Var-Blocks, and reduced the contract price, which was \$75,126.15, by \$4,495.35.

The contract, which was dated September 21, 1956, was on U. S. Standard Form 23 (Revised March 1953), and incorporated the Gen-

September 22, 1958

eral Provisions for construction contracts in U. S. Standard Form 23A (March 1953). It provided for the construction and completion of a 69-Kilovolt capacitor installation at Folsom-Elverta terminal switching facilities of the American River Division of the Central Valley Project in California under the schedule of specifications No. DC-4707.

Under paragraph 23 of the specifications, the Government was to furnish the items of electrical equipment listed therein, which included two 69,000-volt, 25,200-Kvar, outdoor, power, shunt capacitor equipments, to be manufactured by Tobe Deutschmann Corporation.

Construction of the type of electrical installation provided for by the contract could be performed under two different methods: (1) If the Government supplied individual capacitor units, unit fuses, connectors, supporting structures, insulator assemblies and accessories, the individual capacitor units and associated equipment could be assembled into stacking units (sometimes called Var-Blocks) at the site. These stacking units would then be assembled in tiers requiring connections between tiers and finally the tiers would be assembled into sections with appropriate electrical connections made according to requirements. (2) If the individual stacking units were assembled at the factory by the supplier, it would then be necessary only to assemble the units into tiers and the tiers into sections, making the necessary electrical connections between the components.

The scope of the contractor's duty with respect to the installation of major outdoor electrical equipment was defined in paragraph 60 of the specifications. In so far as its provisions are pertinent to the disposition of the appeal, they were as follows:

The contractor shall install the major outdoor electrical equipment listed at the end of this paragraph. The description and estimated weights of this equipment is included under Paragraph 23. The electrical equipment may be furnished not completely assembled.

The 69,000-volt shunt capacitor equipments are being purchased from the Tobe Deutschmann Corporation. The capacitor equipments are of the outdoor, open-stack type, and consist of mounting frames, individual capacitor units, individual capacitor unit fuses, buses, connectors, supporting steel structures, insulator assemblies, and accessories. The contractor shall install the complete capacitor equipments including the steel supporting structures and all component parts such as capacitor units, fuses, buses, connectors, insulators, and accessories, and such work will be considered to be a part of the capacitor equipments installation.

The controversy between the appellant and the Government is whether the appellant was required by paragraph 60 of the specifications to assemble the individual capacitor units and associated equipment into Var-Blocks.

Under date of January 10, 1956, the Government had entered into a contract with the Tobe Deutschmann Corporation for the supply of the equipment. It appears that after the making of this supply contract a controversy arose between the Government and Tobe Deutschmann as to whether the contract required the contractor to assemble the individual capacitor units and associated equipment into Var-Blocks. The contracting officer held that this was a requirement of the contract and Tobe Deutschmann protested the decision in a letter under date of December 27, 1956. Under date of February 8, 1957, the contractor wrote a long letter to Tobe Deutschmann explaining the basis of his decision, and it was finally accepted by Tobe Deutschmann. The supplier shipped the capacitors unassembled but contracted with the appellant to perform the work for Tobe Deutschmann at a price which the Government states to have been \$10,800.

Having elected to require Tobe Deutschmann to assemble the capacitor into Var-Blocks, the Government proceeded to delete what it regarded as the same requirement from the appellant's contract. In a letter dated December 4, 1956, which referred to a verbal request made by the appellant on November 15, 1956, for clarification concerning its responsibility for assembly of the capacitor equipments, the appellant was informed that the complete assembly of the capacitor equipments was its responsibility under the terms of the contract but that the requirement would be deleted. At first the Government proposed, by reason of such deletion, to make an equitable adjustment in its favor in the amount of \$6,586.46, but after some correspondence which led to a conference the Government and the appellant agreed that the amount of the equitable adjustment should be \$4,495.35 rather than \$6,586.46, and Order for Changes No. 2 was prepared on this basis. The appellant refused, however, to accept the change order and took the present appeal, contending that there was no basis for a deletion, since under the terms of its contract it was not required to assemble the capacitor equipments into Var-Blocks.

The appellant asserts that its bid was premised upon being supplied with assembled Var-Blocks, and that this premise was entirely justified by its pre-bid investigation. The nature and extent of this investigation is thus set forth in its letter of September 10, 1957, to the Government in which it rejected Order for Changes No. 2:

At the time of bidding, we requested advice from the Bureau of Reclamation as to whether the capacitors would be shipped individually or in assembled Var-Blocks by the supplier. The Bureau could give us no information so we took it upon ourselves to communicate with Tobe Deutschmann Corporation and were told that the capacitors would be shipped to Elverta, California, as assembled Var-Blocks.

September 22, 1958

In the statement of its position, the Government concedes that the appellant did not in fact include in its bid the cost of assembling the Var-Blocks, although it submits that this concession does not furnish a proper basis for determining how other bidders interpreted the specifications. On the other hand, the Government, for lack of knowledge of the nature and extent of the appellant's pre-bid investigation, demands proof of the appellant's allegations with respect to its contacts with Bureau of Reclamation officials, and the Tobe Deutschmann Corporation. In particular it demands that the appellant identify the Bureau officials from whom it requested advice, and that it prove that it was advised by the Tobe Deutschmann Corporation that the latter would assemble the Var-Blocks.

It is the Government's position on the substantive merits of the controversy that the provisions of paragraph 60 of the specifications are clear and unambiguous but it argues further that, even if they can be said to be ambiguous, the record shows that the appellant was aware of the ambiguity, and that it was, therefore, under a duty to resolve the ambiguity by contacting responsible Bureau officials rather than a representative of the Tobe Deutschmann Corporation. The Government submits, however, that if its position is accepted there is no necessity to determine any of the disputed questions of fact.¹

The Board is of the opinion that the appeal may be determined on the present record, and that it must be decided in favor of the Government.

The Board is unable to perceive in the provisions of paragraph 60 of the specifications any serious source of ambiguity. There would have been no need to enumerate the individual components of the capacitor equipments if they were to come assembled in Var-Blocks. Moreover, in the third and last sentence of the quoted portion of paragraph 60, it is plainly stated that the contractor is to install "the complete capacitor equipments," and it is significant that the individual component parts are again enumerated. There is, to be sure, the statement which constitutes the second sentence of the first paragraph of the quoted portion of paragraph 60 indicating that the electrical equipment "may be furnished not completely as-

¹ In this connection, the Government points out that it is doubtful whether the action of the contracting officer in asking the appellant to accept Order for Changes No. 2 can be regarded as a final decision within the meaning of the disputes clause but, since the controversy between the parties was defined in the course of the consideration of the change order, it raises no objection to the consideration and disposition of the appeal, if this can be done without resolving disputed issues of fact. If this cannot be done, the Government contends that the case should be remanded to the contracting officer for the purpose of making findings of fact.

sembled," which implies that some of the electrical equipment may be completely assembled, but this provision was inserted because a considerable number of other items of electrical equipment, in addition to the capacitor equipments, are dealt with in paragraph 60. As for the statement that the capacitor equipments were to be purchased from the Tobe Deutschmann Corporation, this information could be regarded as a source of ambiguity only if there was a universally recognized practice on the subject of the assembly of the capacitor equipments. It is obvious, however, that the contrary was the case, for otherwise no dispute would have developed either between Tobe Deutschmann and the Government or between the appellant and the Government.

Assuming for the sake of argument, however, that it can be said that paragraph 60 of the specifications harbored some element of ambiguity, still there is not for application in the present case the rule of interpretation *contra proferentem*, which would require that the provision be construed against the Government which had drafted it. This rule may not be applied when the party invoking it was aware of the ambiguity, as in the present case. As the Court of Claims said of another contractor who had sued the Government: "We think that plaintiff, aware of an ambiguity, perhaps inadvertent, in the defendant's invitation to a contract, could not accept the contract and then claim that the ambiguity should be resolved favorably to itself."² The court also recognized in this case that the contractor, having discovered the ambiguity was bound to seek clarification.

Of course, as is apparent from the record, the appellant in the present case did make some attempt to seek clarification but the question arises whether this attempt was sufficient. Its statement on this subject, which is contained in the quotation given above from its letter on September 10, 1957, is at least equivocal. It contains, on the one hand, the assertion that it requested advice "from the Bureau of Reclamation," which would be consistent even with the idea that it sought to contact the contracting officer. The assertion, on the other hand, that the Bureau "could give us no information" would seem to contradict this, since it is hardly conceivable that if the contracting officer had been contacted he would not have been in a position to give the desired information. In the statement of its position, the Government sought a clarification of the appellant's equivocal statement by challenging the latter to identify the person in the Bureau whom it contacted in its effort to secure information.

In addition, the Government has offered an affidavit by Emil J. Scheiber, the head of the Design Branch, of the Division of Design

² Consolidated Engineering Co., Inc., 98 Ct. Cl. 256, 280 (1943). See also the very recent case of *Ring Construction Corporation v. United States*, No. 90-55, Court of Claims.

September 22, 1958

and Construction of the Region 2 office of the Bureau of Reclamation at Sacramento, California, in which the affiant deposes that, prior to the bid opening, in a telephone conversation with Mr. R. M. Rosauer, the vice president of the appellant, who inquired "whether the capacitor equipment to be supplied by the Government under the specifications was to come assembled or unassembled," he informed the appellant's representative that "complete assembly and installation of the equipment was indicated in paragraph 60 of the Specifications * * *" but that he also suggested that "he call the Denver office of the Bureau of Reclamation." The affiant also deposes that he recollects that the appellant's representative then stated that "he was going to call Tobe Deutschmann." The appellant has not responded either to the Government's challenge, or its affidavit by filing a reply to the statement of the Government's position, or by supplying further information or proof in any other manner, nor has the appellant requested a hearing for the purpose of taking testimony.

On the basis of the record the Board must find, therefore, that the only effort made by the appellant to contact a responsible official of the Bureau of Reclamation was the telephone call mentioned in the affidavit, and that this resulted in his being advised by the affiant that in his opinion he was required to assemble the capacitor equipments but that he might also check with the Denver office of the Bureau of Reclamation.

The Board is willing to assume that some representative of the appellant did contact Tobe Deutschmann in an effort to secure further clarification. But since the Government is unwilling to concede the appellant's contention that it was informed by Tobe Deutschmann that it would assemble the Var-Blocks, the Board cannot accept it as a fact that the appellant was given such information by the supplier, especially since the record would seem to indicate that at the time of the appellant's inquiry the dispute between Tobe Deutschmann and the Bureau concerning the assembly of the Var-Blocks had not been definitely resolved. However, even if the Board were to make the assumption most favorable to the appellant, namely that it was told by Tobe Deutschmann that the Var-Blocks would come assembled, the Board would still be unable to conclude that the appellant had made due and proper inquiry in an effort to resolve the ambiguity in the specifications. Whatever other conclusion might have been warranted if the appellant had never approached any of the officials of the Bureau of Reclamation but had confined itself to contacting Tobe Deutschmann in its effort to clarify the allegedly doubtful requirement, certainly it could not rely solely on the advice of the latter after it had received advice to the contrary from a Bureau official and

been put on notice that an authoritative interpretation could be obtained only from the Denver office of the Bureau of Reclamation, which would normally be the source of any such interpretation. The dangers of permitting a construction contractor to seek an interpretation of a requirement of its contract from a supplier of the equipment which it was to install are amply illustrated by the very circumstances of the present case.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer, deleting the assembly of the Var-Blocks from the requirements of the contract, and reducing the contract price by \$4,495.35, is hereby affirmed.

WILLIAM SEAGLE, *Member.*

We concur:

THEODORE H. HAAS, *Chairman*

GEORGE W. TOMAN, *Alternate Member*

JAMES G. BROWN

M. H. YOUNG

A-27635

Decided September 24, 1958

Grazing Permits and Licenses: Base Property (Land): Generally

Base property may be invested with dependency by use by transfer from other property if the application for transfer of base property qualifications presented under section 161.7 (b) of the Federal Range Code designates specific property owned or controlled by a transferee with sufficient productivity to support the qualifications to be transferred.

Grazing Permits and Licenses: Base Property (Land): Generally

Where grazing rights are acquired in excess of the commensurability of the lands to which such rights are transferred and the transferee thereafter acquires additional base property, the excess grazing rights cannot be attached to the after-acquired lands where the transferee fails within the time allowed him by the range manager to offer such lands in a transfer of such excess rights.

Grazing Permits and Licenses: Base Property (Land): Ownership or Control

Loss of ownership or control of property to which base property qualifications have attached results in the loss of such qualifications in the absence of a proper and timely application for transfer of such qualifications to specific property of sufficient productivity to receive them.

*September 24, 1958***Grazing Permits and Licenses: Base Property (Land): Generally**

Patented mining claims of sufficient productivity to support base property qualifications may be designated as base property and used to support an application for Federal grazing privileges. Unpatented mining claims cannot be regarded as base property of a Federal range user because in the absence of patent the holder of a mining claim is without right to use the claim for grazing purposes.

Mining Claims: Possessory Right

Possession of the surface of the land included in an unpatented mining claim does not permit the locator to use the mining claim for grazing purposes or to grant this privilege to others.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

James G. Brown has appealed from a decision of the Director of the Bureau of Land Management, dated January 15, 1958, which modified a decision of the hearing examiner, dated February 23, 1956, which, in turn, modified a decision of the range manager of March 26, 1954, relating to grazing privileges in Utah Grazing District No. 9.

The appellant is a livestock operator who has been engaged in the livestock business since approximately 1915 and who has grazed sheep in Utah since 1928 or 1929 (Tr. 137).¹

In the area to which this appeal relates, it has been determined that under the Federal Range Code (43 CFR, 1957 Supp., Part 161) the maximum period of time for which use of the Federal range can be permitted is 7 months out of any year (43 CFR, 1957 Supp., 161.5). Accordingly, any user of the Federal range must show that he has lands under his control, either as a result of ownership or leasing, designated as base lands, which have sufficient carrying capacity to graze for the additional 5 months of the year the number of animals which he wishes to graze on the Federal range. Under established procedures, the lands offered as base lands are examined and a rating, based upon the number of months of forage sufficient to support one cow for one month, is assigned to each tract of the base lands. Forage necessary for the sustenance of one cow for a period of one month is designated for the purpose of such ratings as 1 animal unit month, which is, for convenience, referred to as 1 AUM. It is assumed that 5 sheep are equal to one cow for grazing purposes (43 CFR, 1957 Supp., 161.2 (m)). Because the Federal range can be grazed for 7 months of the year in this area, it is not necessary that the base lands supply more than five-twelfths of the necessary forage needed for an animal for a year. In practice, a user of the Federal range in the area to

¹ The page references except where otherwise noted are to the transcript of the hearing before the Hearing Examiner and the exhibits referred to are those offered at that hearing.

which this appeal relates is regarded as entitled to grazing privileges measured in terms of 1.4 AUMs for each AUM furnished by his base lands. It has also been determined that permits should be given only upon the basis of use of the Federal range for at least 2 consecutive years or 3 nonconsecutive years out of the 5 years immediately preceding the enactment of the Taylor Grazing Act on June 28, 1934 (43 CFR, 1957 Supp., 161.2 (k)). Accordingly, each applicant for grazing privileges is required to show that he controls base lands which can qualify both as to the required (1) priority of use and (2) productivity measured in AUMs.

As a result of an application filed in 1941 by the appellant for grazing privileges on the Federal range under the Taylor Grazing Act (43 U. S. C., 1952 ed., sec. 315 *et seq.*), the lands owned or controlled by the appellant were listed and rated in terms of their capacity to provide sustenance for grazing purposes. The carrying capacity of Brown's lands was resurveyed in 1949. The results of these surveys may be tabulated as follows (BLM Exs. 11, 12, and 34) :

Reference No. ²	Name of property	AUMs in 1941	AUMs in 1949
1.....	Auguste Nicolas.....	151	202
2.....	J. & H. Deeble.....	16	16
3.....	Edward Silva.....	780	780
4.....	Twilla B. Brown.....	120	160
5.....	Peter Petersen.....	26	26
6.....	James G. Brown.....	259	259
7.....	J. J. Baker.....	107	107
8.....	Fred McCormick.....	20	27
9.....	Freeman.....	785	-----
10.....	Fred McCormick.....	68	-----
11.....	Milo Wormell.....	130	157
12.....	C. V. Moore.....	91	-----
13.....	C. A. Wackowitz.....	69	96
	American Flats Mining Claims.....	246	?
Total.....		2, 868	1, 830

² The reference to number and name of property were used to simplify the description of the lands that Brown owned or controlled (Tr. 10-12).

Provision was made in 1941 for a reduction of 29 percent because of the condition of the Utah range and the appellant was permitted to graze 1,860 sheep for a 7-month period, from October 15 to May 15, in Utah Grazing District No. 9, but, because there was some doubt that his base lands had sufficient priority, he was advised to purchase Federal grazing rights from others whose base lands had unquestioned priority. Accordingly, he purchased from Mabel Johnson the right to acquire grazing privileges to the extent of 2,107 AUMs and asked that the priority thus evidenced be assigned to the lands which he then held. The appellant was notified of official approval of such transfer in 1942.

September 24, 1958

In addition to the tracts listed above as being owned or controlled by Brown, it appears that he acquired control of lands known as the Lynn property (1948), purchased two tracts from the United States (1951 and 1953), and has leased other lands known as the Catlin Ranch (1952) (Tr. 73, 77). It also appears that the appellant has leased certain patented and unpatented mining claims in Colorado Grazing District No. 3 in the American Flats Area, San Juan County, Colorado (Tr. 145-147). The American Flats is an area of high altitude grazing land, in which there are numerous patented and unpatented mining claims. The livestock operators held grazing leases from the patentees and locators, but the leases of any one operator were scattered throughout the area. To control grazing under this condition, the Grazing Service worked out an arrangement whereby each operator who could qualify for grazing privileges in the area was given an individual allotment, which he used exclusively, even though some of his leased lands might be in another's allotment and leased lands of another might be in his allotment (Rose Deposition 1-7). Brown was one of those who received an individual allotment (Tr. 48-49). It also appears that Brown no longer owns or controls the so-called Freeman, McCormick, Moore, Deeble and Silva lands (Tr. 54, 176, 201, 202; BLM Ex. 12).

From 1945 on, the local grazing officials of the Bureau of Land Management and Brown have been in disagreement as to the propriety of the transfer of the Johnson rights and the grazing privileges to which Brown is entitled. However, the events immediately leading to this appeal began with the appellant's application filed on October 1, 1953 (BLM Ex. 1), which sought the issuance of a permit to graze 3,365 sheep from October 16, 1953, to May 15, 1954, on the Federal range in Utah Grazing District No. 9 under the Taylor Grazing Act. On October 9, 1953, the range manager informed the appellant that the advisory board of the grazing district had recommended in regular session on October 6, 1953, that his application be approved to the extent of 822 AUMs; that the balance be rejected because of loss of qualifying base property. The appellant was also told that he might protest, if he wished, at the meeting on October 21, 1953. A representative of the appellant was present at the board meeting on October 21, 1953, at which it was decided that consideration of the appellant's case be postponed until the regional office had completed a current investigation of the case and that a summary of the investigation be furnished to the appellant and his representative (BLM Ex. 3).

At a subsequent meeting of the board on December 10, 1953, which was designated as both a regular and a protest meeting, with the

appellant's representatives in attendance, the case was considered and final action taken (BLM Ex. 4). The board noted that the appellant desired to transfer 1,022 AUMs of the Mabel Johnson Federal grazing rights which he had acquired by purchase to the Catlin ranch, which he held under 5-year lease, and to transfer the remainder of 1,085 AUMs of the Johnson rights to other lands owned or controlled by him pursuant to 43 CFR 161.7 (c) and (b). The board recommended unanimously the denial of the request for transfer of 1,022 AUMs from the Johnson property to the Catlin ranch for want of appeal by the appellant from a notice sent him on May 1, 1952,³ and approval of the transfer of 775 AUMs of grazing rights from the Mabel Johnson property to property under the control of the appellant. The board further directed that the total of 775 AUMs be reduced to 705 because of the 35 percent reduction in range use in 1952 and that the adjustments indicated be processed on proper application by Mabel Johnson or her representative (BLM Ex. 4).

An application for transfer to be signed by the appellant and Mabel Johnson was subsequently prepared by the range manager and delivered to the appellant's representative who was unable to obtain Mrs. Johnson's signature (Tr. 67). The range manager then informed the appellant by registered mail that his signature must be submitted (BLM Ex. 44), but the appellant failed to sign the application form. Accordingly, on March 26, 1954, the range manager informed the appellant that he would be allowed grazing privileges to the extent of 498 AUMs during the established grazing season, but that a temporary emergency license issued, apparently in response to the application of Milo Wormell on December 1, 1953, for the winter of 1953-54 to the extent of 1,650 sheep from December 10, 1953, to May 10, 1954, would be continued to its expiration date (BLM Ex. 45).

The appellant appealed and requested a hearing which was held on October 20, 21, and 22, 1955. At that time, M. H. Young appeared as an intervener, but did not submit any evidence. After the taking of testimony on all the issues and oral argument on the question whether unpatented mining claims may constitute base property for grazing privileges, the hearing examiner issued his decision dated February 23, 1956, sustaining the appellant's right to 840 AUMs of Federal range use in Utah Grazing District No. 9 and additional use privileges to the extent of the carrying capacity of patented

³ This notice, which was a letter to Brown from the range manager, said that Brown's request to transfer the Johnson privileges to some mining claims he had under lease was denied, that on the basis of the base properties he controlled, he was entitled to 1264 AUMs use of the Federal range, and that a study would be made of lands Brown said he had bought or was buying so that their commensurate ratings could absorb the Johnson privileges.

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mining claims he leases within his grazing allotment in Colorado, to be computed by multiplying the carrying capacity by 1.4 (to apply the 5-month base property requirement, *supra*) and reducing the product by 35 percent (to provide for the conservation factor).

The appellant then appealed to the Director of the Bureau of Land Management and on January 15, 1958, the Director held that the appellant is entitled to the privileges which the hearing examiner recognized in his decision and that he may also file an application for exchange of use for his leased patented mining claims outside of his individual allotment in Colorado Grazing District No. 3 if such claims in that district are, in fact, utilized under Federal range authorization by others.

The appellant has appealed to the Secretary of the Interior alleging that the Director erred (1) in denying his eligibility for transfer of 1,085 AUMs of the Johnson priority rights to the Lynn property, the Catlin ranch, and the Government purchase property; (2) by denying eligibility for transfer of 796 AUMs from the Silva and Deeble ranches to the Lynn and the Government purchase properties; (3) by not recognizing the exchange of use in the American Flats area and his eligibility for transfer of 627 AUMs of the Johnson rights to the mining claims in the American Flats area; and (4) in finding that 785 AUMs attached to the Freeman land in the adjudication of 1941, which marks the initial recognition of his rights out of which the current controversy arose.

Since 1945 and throughout the course of this appeal, the Bureau of Land Management has taken the position that the transfer of the Johnson priority has not yet been effected, chiefly because it was not approved by the regional administrator, and numerous efforts have been made to obtain an effective transfer. Meanwhile, the appellant has lost control of some of his original base lands and has acquired some additional base. The hearing examiner held in his decision of February 23, 1956, that the transfer of the Johnson priority was effected on October 29, 1942. This conclusion rests upon the applicable regulation as of the date of the application for transfer and the alleged approval, 43 CFR 161.7 (b), which reads:

Transfer of a license or permit; limitations; effects; consent of owner or encumbrancer. Upon application by a licensee or permittee, and after reference to the advisory board for recommendation, the range manager may allow a license or permit based on ownership or control of land to be transferred to other land or a license or permit based on ownership or control of water to be transferred to other water within the same service area: *Provided*, That such transfer will not interfere with the stability of livestock operations or with proper range management and will not affect adversely the established local economy: *Provided further*, That no such transfer will be allowed without the written consent of the

owner or owners and any encumbrancers of the base property from which the transfer is to be made, except that when the applicant for such transfer is a lessee without whose established livestock operations such property would not have dependency by use or priority, such consent will not be required. Upon the allowance of a transfer under this paragraph, the base property from which the transfer is made shall lose its dependency by use or priority to the extent of the license or permit transferred.

The Director did not disturb this finding.

The hearing examiner also recognized the appellant's right to the grazing privileges indicated by the survey of 1949 on the properties numbered above as 1, 4, 5, 6, 7, 8, 11, and 13, a total of 1,034 AUMs. The Director did not disturb this finding.

The hearing examiner recognized the appellant's right to additional grazing privileges in Utah based upon his patented mining claims within his grazing allotment in Colorado and the Director added to this recognition still more grazing privileges based upon the informal exchange of use of his patented mining claims in Colorado Grazing District No. 3 if and to the extent that these claims are being utilized under authorization of the Bureau of Land Management.

The hearing examiner and the Director have recognized the transfer of Johnson grazing privileges to lands which the appellant controlled when the transfer was effected. Since, as the hearing examiner pointed out, the procedure utilized for the purpose of effecting the transfer met the requirements of the Range Code and was not questioned by the officers who administered the Federal range for a period of nearly 4 years, I concur in the hearing examiner's conclusion that the transfer was accomplished on October 29, 1942. I also agree that it was effective only to transfer grazing privileges to lands owned or controlled by the appellant at that time to the extent of the unobligated commensurability of such lands.

The appellant contends that he was led to believe that if he acquired other lands after 1942 the transfer would be recognized to the extent of the commensurability of such lands. Without giving any approval to such a procedure, it is sufficient to point out that the appellant failed within the time allowed him by the range manager to offer any after-acquired lands to which the excess grazing privileges could have been transferred and has thus lost whatever claims he had under such arrangement. This finding disposes of appellant's claims based upon his acquisition of ownership or control of the Lynn, Catlin and United States lands.

It is apparent that the appellant lost control of base properties which were invested with priority in 1941 and made no attempt to transfer such priority to other lands (Freeman, Moore and McCormick lands). Nor does the record indicate that the appellant made any

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attempt to retain the Federal grazing privileges which attached to the Silva and Deeble lands when they passed from his control as a result of conveyance of title or termination of leases or that he presented an application for transfer of such privileges to other lands which he admittedly acquired. It is equally clear that the Federal Range Code, in the form which was current at the time of the transactions in question and now (43 CFR 161.7, and 43 CFR, 1957 Supp., 161.7) requires a specific request by the range user, recommendation by the advisory board and approval by the range manager in order to effect a transfer. It is necessary to conclude, therefore, that no transfer of the grazing privileges attaching to the Silva and Deeble lands can be recognized.

The appellant has misconstrued the Director's decision in supposing that it contains any denial of an exchange of use of mining claims in the American Flats area. On page 9 of his decision, the Director specifically declared that the appellant may file his application with the range manager in Colorado Grazing District No. 3 and Utah Grazing District No. 9 for an exchange of use, pursuant to the pertinent regulation (43 CFR, 1957 Supp., 161.6 (c)), of the patented mining claims in the American Flats area and may receive the equivalent in grazing privileges in one or the other of these districts as appears proper. It was only the unpatented mining claims which the Director excluded from consideration in the proposed exchange of use in accordance with the decision of the Federal circuit court in *United States v. Etcheverry*, 230 F. 2d 193 (10th Cir., 1956). The appellant has presented nothing which affords any basis for overturning the Director's decision on this point. Accordingly, it will not be disturbed. Furthermore, the hearing examiner and the Director both allow the appellant grazing privileges to the extent of the capacity of the patented mining claims he controls within his individual range allotment. This is all he is entitled to.

Whether the Freeman lands were recognized to have priority in 1941 is immaterial at this time since the appellant no longer controls them and has not transferred any grazing privileges that may have been accorded to them to his other base lands. The appellant's contention in this respect is apparently predicated upon the assumption that if no priority was assigned to the Freeman lands, other lands lacking priority were available in 1942 to receive a portion of the Johnson grazing privileges. But all of the lands which the appellant controlled in 1942 which were eligible for transfer of the Johnson grazing privileges have been recognized to the full extent of their productivity. Hence, whether the appellant lost grazing privileges because he disposed of the Freeman lands or for want of sufficient

base lands to be invested with the Johnson grazing privileges, the consequence now is the same. The appellant's contention in this matter is without merit.

The appellant has not questioned any deduction of AUMs for conservation purposes. Accordingly, he is bound by all such deductions evidenced by the records of the Bureau of Land Management. The extent to which he is entitled to grazing privileges in Utah Grazing District No. 9 is to be determined on the basis of the Director's decision of January 15, 1958.

Therefore, the decision of the Director is affirmed pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F.R. 6794).

EDMUND T. FRITZ,
Acting Solicitor.

CHRISTIAN G. WIEGER

A-27680

Decided September 29, 1958

Rules of Practice: Appeals: Generally

An appeal to the Secretary of the Interior will be dismissed and the case closed where the appellant fails to pay the filing fee within the time required by the rules of practice.

Rules of Practice: Appeals: Timely Filing

The late payment of a filing fee on an appeal to the Secretary of the Interior cannot be waived where the record shows that the filing fee was not mailed to the Secretary until after the expiration of the period of time within which the filing fee was required to be paid, even though the fee was received within the 10-day period of grace stipulated in 43 CFR 221.92 (b).

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Christian G. Wieger has attempted to appeal to the Secretary of the Interior from a decision dated February 7, 1958, of the Director of the Bureau of Land Management, which affirmed the action of the manager of the Cheyenne land office rejecting his application for a 5-year extension of noncompetitive oil and gas lease Wyoming 010711 on the ground that his request had been filed late (30 U. S. C., 1952 ed., Supp. V, sec. 226; 43 CFR 192.120).

The penultimate paragraph of the Director's decision stated:

Christian G. Wieger is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the *Director, Bureau of Land Management, Washington 25, D. C.*, in time to be received there within 30 days after receipt by the appellant of this decision, and,

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must be accompanied by a \$5 filing fee. * * * Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

A registry receipt card in the record shows that notice of the Director's decision was received by Wieger on March 5, 1958. Thus, the 30-day period for filing a notice of appeal and paying the filing fee terminated on April 4, 1958. On April 2, 1958, Wieger filed a notice of appeal by sending a telegram to the Director stating that he wished to appeal from the Director's decision and that he would file a formal application. The \$5 filing fee was not transmitted. On April 4, 1958, an official of the Bureau of Land Management sent a telegram "Collect" to Wieger stating that the required filing fee must be transmitted to the Bureau of Land Management before 3 p. m. of that day for the appeal to be considered. At 1:05 p. m., April 4, 1958, Western Union notified the sender that the message and payment had been refused. On April 7, 1958, Wieger paid the filing fee along with a letter dated April 5, 1958, in which he stated:

Received through the mail today, confirmation of communication dated April 4, 1958. Delivered to me approximately at 10:30 A. M. today.

Received also from Western Union the enclosed card [re. the telegram of April 4, 1958, which Wieger had refused.]

Enclosed find check for \$5.00, Re: appeal.

As of the date that Wieger received a copy of the Director's decision the Department's rules of practice provided:

Appeal; how taken, filing fee, mandatory time limit. A person who wishes to appeal to the Secretary from a decision of the Director must file in the office of the Director a notice that he wishes to appeal. Except where an agency of the Federal Government or of a State or territorial government or political subdivision thereof or a municipal corporation is the appellant, the notice of appeal must be accompanied by a filing fee of \$5 for each separate application, claim, entry, permit, lease, protest, or similar filing or interest on which the appellant is seeking favorable action. * * * A notice of appeal which is filed late or which is not accompanied by the required filing fee will not be considered and the case will be closed by the Director. * * * 43 CFR, 1957 Supp., 221.32.

Because the filing fee was not paid within the 30-day period the Director, except for the reasons set out later, would have, pursuant to the requirements of the regulation, closed the case and the appeal would not have been considered.

However, on March 18, 1958, the regulation was amended to read as follows:

Appeal; how taken, filing fee, mandatory time limit. (a) A person who wishes to appeal to the Secretary must file in the office of the Director (address: Director, Bureau of Land Management, Washington 25, D. C.) a notice that

he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the Director's office within 30 days after the person taking the appeal is served with the decision he is appealing from. * * *

(b) Except where an agency of the Federal Government or of a State or territorial government or political subdivision thereof or a municipal corporation is the appellant, a filing fee of \$5 must be paid for each separate application, claim, entry, permit, lease, protest, or similar filing or interest on which the appellant is seeking favorable action. The consolidation of appeals will not relieve each appellant of paying the same filing fee that he would have to pay if he took his appeal separately. The filing fee should accompany the notice of appeal but in any event must be received in the Director's office within the time allowed for filing the notice of appeal.

(c) No extension of time will be granted for filing the notice of appeal or paying the filing fee. If a notice of appeal is filed or the filing fee is paid after the grace period provided in § 221.92, the notice of appeal will not be considered and the case will be closed by the Director. If the notice of appeal is filed or the filing fee is paid during the grace period provided in § 221.92 and the delay in filing is not waived, as provided in that section, the notice of appeal will not be considered and the case will be closed by the Secretary. 43 CFR 221.32; Circular 1997, 23 F. R. 1929.

43 CFR 221.92, as amended at the same time, provides:

Filing of documents. (a) A document is filed in the office where the filing is required only when the document is received in that office during the office hours when filing is permitted and the document is received by a person authorized to receive it.

(b) Whenever a document is required under this part to be filed within a certain time and it is not received in the proper office, as provided in paragraph (a) of this section, during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal or contest in connection with which the document is required to be filed. This paragraph does not apply to requests for postponement of hearings under §§ 221.13 and 221.75 and requests for relief from reporter's fees under § 221.75. 43 CFR 221.92; Circular 1997, 23 F. R. 1929.

The amended regulations took effect on March 22, 1958, as to all filings required to be made on or after that date.

The filing fee having been paid within the 10-day grace period allowed by the regulation, the case was transmitted to the Secretary for a determination as to whether the delay in filing will be waived.

From Wieger's letter which transmitted his filing fee and from the postmark on the envelope containing the letter and check, it is clear that the filing fee was mailed on April 5, 1958. As the period within which Wieger was required to pay the filing fee ended on April 4, 1958, the failure to pay the filing fee cannot be waived under

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the provisions of 43 CFR 221.92 (b), as amended, because it was not transmitted (mailed) to the Secretary's office before the end of the period in which it was required to be filed. See *Duncan Miller*, 65 I. D. 380 (1958).

Since the delay in filing cannot be waived, the notice of appeal will not be considered and the case is closed (43 CFR 221.32 (c), as amended).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the appeal is dismissed and the case is closed.

EDMUND T. FRITZ,
Acting Solicitor.

L. N. HAGOOD ET AL.

A-27657

A-27667

A-27681

Decided September 29, 1958

Oil and Gas Leases: Rentals—Accounts: Refunds

An opinion by the Comptroller General that there is no authority for a repayment of the rentals paid on an oil and gas lease for land for which a mineral entry is later allowed and for which a patent is issued is binding upon the Secretary of the Interior.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

L. N. Hagood and the other parties named * have each appealed from one of two decisions of the Director of the Bureau of Land Management dated February 7, 1958, and January 22, 1958, respectively, which affirmed the action of the manager of the Denver land office rejecting their respective applications for the refund of rentals paid in connection with noncompetitive oil and gas leases issued to each of them.

In all of these cases the oil and gas leases were issued for lands which in whole or in part were covered by oil shale placer locations located prior to the date of the Mineral Leasing Act of February 25, 1920 (30 U. S. C., 1952 ed., sec. 181 *et seq.*), but for which patent applications were not filed until after the leases had been issued. In each case, except Colorado 01407, mineral patents have been issued and the oil and gas leases canceled to the extent of the conflict. The appellants seek refunds of the rentals paid by them under their

* Edward Still, L. Jeane Tipton Dorrough, Maude M. Dorrough, Helena K. Trimble, and Ben L. Abbott.

leases. In addition, Helena K. Trimble and Ben L. Abbott each failed to pay some rental due on one of the anniversary dates of their leases and have appealed from the demand that they pay the rental due from the anniversary date to the date on which the pertinent mineral patent was issued.

Repayment of payments in excess of lawful requirements made under the Mineral Leasing Act (*supra*) is authorized by the act of June 27, 1930 (43 U. S. C., 1952 ed., sec. 98 (a)).

As the Director and the manager have pointed out, the Secretary of the Interior submitted to the Comptroller General the problem of whether repayment of such rentals could legally be made in the case of lease Colorado 01399, held by appellant Trimble. By statute the Comptroller General is authorized to pass upon questions submitted to him by the head of any Executive department involving a payment to be made by him (31 U. S. C., 1952 ed., sec. 74). The decision of the Comptroller General when rendered governs the disposal of the case. *Six Companies, Inc.*, 53 I. D. 586, 589 (1932); 33 Op. Atty. Gen. 268 (1922);¹ see *United States ex rel. Skinner & Eddy Corporation v. McCarl*, 275 U. S. 1, 4-5 (1927).

In his letter, dated March 2, 1955, the Secretary stated the factual situation as follows:

A non-competitive oil and gas lease application (Colorado 01399) under the Mineral Leasing Act of 1920 (41 Stat. 437; 30 U. S. C. 181), as amended and supplemented, was filed July 14, 1950 and lease was issued effective April 1, 1951. Rentals for the first lease year for the areas conflicting with certain mining claims aggregated \$642.50. Under 43 CFR 192.80 no rentals were due for the second and third lease years, but for the fourth lease year rentals amounted to \$321.25 for the lands in question. On August 3, 1953, the Weber Oil Company filed mineral patent application Colorado 07026 for certain oil shale placer mining claims which were located prior to enactment of the Mineral Leasing Act of 1920, *supra*. Final certificate for the mining claims was issued on April 19, 1954.

In a decision dated July 1, 1955 (B-123118), the Comptroller General held that no repayment could be made for rentals paid prior to the determination of the validity of the mining claim and the issuance of the mineral patent for the following reasons:

With respect to the questions raised in your letter concerning the application of 43 U. S. C. 95 to 98a to such repayment, section 96 provides in material part that "In all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has made any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives." Section 98 (a) of Title 43, of the Code, extends the

¹The Comptroller General's decision does not prevent the applicant for repayment from pursuing other remedies. See *Miguel v. McCarl*, 291 U. S. 442 (1934).

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above provision to "any statute relating to the sale, entry, lease, or other disposition of the public lands." While these statutory provisions vest you with authority to make a determination that payments have been made in excess of the amounts required under the public land laws, such a determination necessarily must be supported by the applicable law, regulations and facts in each particular case. In the present case it may be presumed that the mineral claim was properly evidenced by posting location notices and performance of maintenance work each year as required by the regulations. Also, it is assumed that the claim was properly recorded as required by local laws. If such be the fact, the lessee entered into the lease with actual or constructive notice of the existing mineral claim. Moreover, if the lessee had complied with the regulations contained in 43 C. F. R. 192.72 and ascertained whether there were settlers on the land, it appears likely that he would have obtained actual knowledge of the mineral claim. Thus, in the absence of any interference with the lessee's possession and beneficial use of the land, it would seem clear that the lessee properly may not now assert a claim for refund of any payments properly payable under the lease, particularly since the lessee was not deprived of any rights under the lease prior to the issuance of the patent to the mineral claimant.

In the light of the foregoing, question 1 is answered in the negative, except as hereinafter noted, thus rendering an answer to question 2 unnecessary.

With respect to question 3, any payment under the lease after determination of the validity of the mining claim and issuance of the mineral patent would appear to be in excess of the payments required by law and to be refundable.

Because the rental payments for which the appellants seek refunds were made prior to the determination that the mining claim was valid and the issuance of the mineral patent, their applications for refunds were properly denied.

All the appellants contend that inasmuch as the mining claims, which have been held valid and have been patented, predated their leases, they took nothing by their leases and consequently all rentals paid should be refunded. The Secretary, in his submission to the Comptroller General, adverted to the effect of the mining claim on the lease by pointing out that the mining claimant could have prevented the lessee from conducting prospecting operations on the land and enjoined the taking of oil and gas from the land in the event of production. Nevertheless the Comptroller General concluded that in the absence of interference with the lessee's possession and beneficial use of the land, no refunds could be made of rentals properly payable under the lease. This conclusion is binding upon the Secretary.

Hagood states that the existence of a mining claim for which no patent application has been filed does not prevent the issuance of an oil and gas lease while the Dorroughs and Still contend that a lease issued for land within a valid mining claim is null and void and contrary to law.

It is well established that oil and gas leases will be issued for lands which may be covered by mining claims for which no application for patent has been filed in the absence of knowledge of such claims. Although such leases are *prima facie* valid (*Ohio Oil Company et al. v. W. F. Kissinger et al.*, 58 I. D. 753, 758 (1944)), they must be canceled if the validity of a prior mineral location is established (*Marion F. Jensen et al., Elden F. Keith et al.*, 63 I. D. 71 (1956)).²

In any event the chief question on the appeal is whether the appellants are entitled to a refund. The final authority within the administrative process on repayments is with the Comptroller General and his opinion plainly denies the authority of the Department to grant the appellants any refunds.

The Doroughs and Still finally urge that they paid the fourth and fifth years' rentals under protest to preserve whatever rights they might have pending final action on the patent applications. The Director held that they were entitled to a refund of all the fifth year's rentals, the pertinent patents having been issued during the fifth lease year, except those portions representing the period between the anniversary date and the date of the patent.

As the Director held, I fail to see that paying the rentals under protest places these appellants in any better position. They could have relinquished their leases or allowed them to terminate automatically. They chose to keep their leases in effect. Consequently, under the Comptroller General's opinion, they cannot obtain a refund for any period prior to the date of the issuance of the patent.

Finally, as stated above, the manager demanded payment of rental on Mrs. Trimble's lease for the period from the fifth anniversary date to the date of the issuance of the mineral patent, and on Abbott's lease he demanded the payment of the fourth and fifth years' rental on the portion not in conflict with the mineral patent. The Director held that these demands were proper and in addition held that accrued rental was due on Abbott's lease as to the portion in conflict with the mineral patent for the fourth year and the fifth year up to the issuance of the mineral patent. Abbott and Mrs. Trimble have protested against these demands. I agree with the Director that if no refund of any payments properly payable under the lease can be made the lessees are properly chargeable for the accrued rentals on their leases that have not been paid.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17

²As to the proper procedure for removing the conflict between an oil and gas lease and a later application for a mineral patent based upon a prior location see *Union Oil Company et al.*, 65 I. D. 245, 252-253 (1958).

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F. R. 6794), the decisions of the Director of the Bureau of Land Management are affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

DON C. CALL, LLOYD HIGLEY ET AL.

A-27658

Decided September 29, 1958

**Grazing Permits and Licenses: Base Property (Land): Dependency by Use—
Grazing Permits and Licenses: Generally**

The provision in the Federal Range Code that in the event of failure for 2 consecutive years to offer base in an application for a grazing license or permit, such property will lose its dependency by use or priority will be read independently of and as unaffected by the provision in the code that each year a time will be set before which applications for grazing privileges must be filed and that applications which are not filed on or before that date will be rejected for that year in the absence of a satisfactory showing justifying the late filing.

Grazing Permits and Licenses: Base Property (Land): Dependency by Use

Where an application for grazing privileges is filed within 2 years after the base offered therein was first recognized as having priority, but the application was filed too late to be considered for an award of grazing privileges for the year in which it was filed, the application nonetheless satisfies the requirements of 43 CFR 161.6 (c) (9) and prevents loss of priority of the base for failure to offer it in an application for 2 consecutive years.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Don C. Call and Lloyd Higley have appealed to the Secretary of the Interior from a decision of January 22, 1958, by the Director of the Bureau of Land Management affirming a hearing examiner's decision dated December 14, 1954, rejecting an application filed on January 4, 1954, by the appellants for grazing privileges in the Clover range unit, Nevada Grazing District No. 1, pursuant to section 3 of the Taylor Grazing Act (43 U. S. C., 1952 ed., sec. 315 b).

The appellants' application was rejected by the Director and by the hearing examiner on the ground that the appellants' base land had lost its dependency by use because of failure to offer it as base in an application for a grazing license or permit for 2 consecutive years as provided by departmental regulation (43 CFR 161.6 (c) (9)). The base property involved consists of approximately 1,440 acres of land located in T. 35 N., R. 62 E., M. D. M., Elko County, Nevada, and was purchased by Mr. Higley at various times between 1942 and 1948. On February 13, 1953, Mr. Call contracted to purchase most of

the Higley base property and this agreement is the source of Mr. Call's interest in this proceeding.

On December 23, 1949, Mr. Higley first filed an application for a grazing license or permit in the Clover range unit requesting privileges for the 1950 grazing season. In explaining his base setup, Mr. Higley stated in this application that he had purchased 480 acres from Russel Weeks, that a copy of the deed of purchase was filed with the Bureau, and that the application was based on a section 7b transfer.¹ The 480 acres specifically offered as base in this application consisted of the E1½ and NW¼ sec. 23. By decision of February 20, 1950, the range manager notified Mr. Higley that his application was approved on a temporary unclassified basis, pending completion of the transfer from Russel Weeks, and that his section 7 transfer application on these privileges was also recommended for approval providing the base lands to which the transfer was being made were commensurate to support the transfer.

In addition to the 480 acres which Mr. Higley offered as base in his application for grazing privileges during 1950, he owned other base lands which were not classified as dependent by use or as having priority when his first application was filed.² The 480 acres purchased from Mr. Weeks had been recognized as having a class 1 demand of 5 AUM's on the Federal range when Mr. Weeks owned the

¹ The 7b transfer refers to an application filed pursuant to a provision in the range code which permits a licensee or permittee to transfer grazing privileges from one base property to another. The transfer application here involved was an application for the transfer of grazing privileges from lands owned by Russel Weeks, another livestock operator in the area, to Mr. Higley's lands. Although the record suggests that an earlier transfer application may have been filed, only one such application is in the records which are a part of this appeal. This is the application of May 10, 1951, filed by Russel Weeks. The applicable regulatory provision in effect when this transfer application was filed (43 CFR 161.7 (b)) provided in pertinent part that:

"Upon application by a licensee or permittee, and after reference to the advisory board for recommendation, the range manager may allow a license or permit based on ownership or control of land to be transferred to other land or a license or permit based on ownership or control of water to be transferred to other water within the same service area: *Provided*, That such transfer will not interfere with the stability of livestock operations or with proper range management and will not affect adversely the established local economy * * *. Upon the allowance of a transfer under this paragraph, the base property from which the transfer is made shall lose its dependency by use or priority to the extent of the license or permit transferred."

² Land dependent by use is forage land other than Federal range of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the priority period, was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the public domain, now part of the Federal range. With exceptions not here relevant, the priority period is the five-year period immediately preceding June 28, 1934. To have dependency by use, base property must have been offered in an application for a grazing license or permit before June 28, 1938, in Nevada Grazing District No. 1 (43 CFR, 1957 Supp., 161.2 (k) (1), (2)). Such land is class 1 base and qualified applicants who own or control class 1 base are entitled to priority in the issuance of regular grazing licenses and permits (43 CFR, 1957 Supp., 161.4 (b), 161.6 (b)).

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land but the rest of Mr. Higley's base was classified as dependent by location or class 2 land which entitled him to grazing privileges only if range was available after the class 1 demand was satisfied (43 CFR, 1957 Supp., 161.4 (b), 161.6 (b) (ii)). The range manager's decision of February 20, 1950, was not based upon the classification of any of Mr. Higley's land for grazing privileges, but authorized only temporary unclassified use of the range to the extent of 301 AUM's pending completion of the transfer of grazing privileges from Russel Weeks.

In a decision of July 17, 1951, the Regional Chief, Division of Range Management, approved Russel Weeks' application for the transfer of grazing privileges in the Clover unit from base lands which Mr. Weeks owned to the following lands owned by Mr. Higley: sec. 23, W $\frac{1}{2}$, SE $\frac{1}{4}$ sec. 25, E $\frac{1}{2}$ E $\frac{1}{2}$, W $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 26, W $\frac{1}{2}$ sec. 28, T. 35 N., R. 62 E., M. D. M. The decision authorized the transfer of class 1 grazing privileges to this base to the extent of 290 AUM's.

No applications for grazing privileges offering Mr. Higley's base property were filed during 1951 or 1952.

Information in the file indicates that on February 6, 1953, Mr. B. C. Call (counsel for the appellants) of Brigham City, Utah, visited the district grazing office and advised employees of that office that he and his son (appellant Don C. Call) had a lease and option to purchase the Higley property. On appeal it is asserted that appellant Call or his attorney twice visited employees of the Bureau before February 9, 1953, advising them of his claim and that he was assured that his application would receive prompt consideration. Counsel for Mr. Call also states that when he visited the grazing office before February 9, 1953, in connection with a permit, he was told that Mr. Higley had not applied as required by the range code, and that no permit would be granted for the 1953 grazing season but Mr. Call was advised to file an application which would be considered by the board at some future date. Thereafter, on February 11, 1953, the appellants filed an application to graze 125 head of cattle and horses from May to September 1, 1953. The application indicated that the appellants intended to purchase livestock not later than April 1, 1954, and stated that the base was leased during 1949 and 1950 owing to Mr. Higley's ill health; that the base had been orally leased for a year, which lease would expire on April 1, 1953; that a contract of lease and sale of base and range rights had been entered into by the applicants; and that Mr. Higley was in failing ill health at the time the application was filed.

In a letter of February 12, 1953, to Don C. Call, referring to the appellants' application of February 11, the range manager stated:

* * * Inasmuch as this is a late application for the 1953 grazing season and no application had been offered on the property since 1949, we are unable to take any action at this time as the last Advisory Board Meeting was held February 9, 1953.

This will undoubtedly not inconvenience you, as your application indicates that you do not have any livestock now and will not purchase stock until April 1, 1954.

It will be necessary for you to supply this office with a copy of the lease and contract of sale from Mr. Higley to Don C. Call. This should be done as soon as the lease becomes effective.

Upon receipt of the lease, your name will be placed on the mailing list and you will receive application forms for the 1954 grazing season.

On January 4, 1954, the appellants filed an application for grazing privileges which was identical with the 1953 application. Mr. Call had also filed evidence of his lease and option from Lloyd and Laura Higley on the following base land: SW $\frac{1}{4}$, E $\frac{1}{2}$, NW $\frac{1}{4}$ sec. 23; W $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ E $\frac{1}{2}$ sec. 26; W $\frac{1}{2}$, SE $\frac{1}{4}$ sec. 25, T. 35 N., R. 62 E., M. D. M. All of this land was base which supported the transfer of grazing privileges from Mr. Weeks approved July 17, 1951.³

By decision of January 14, 1954, the appellants' application of January 4, 1954, was rejected because the base property had not been offered in an application for a grazing license for two consecutive years and therefore lost its dependency by use on the Federal range in accordance with 43 CFR 161.6 (c) (9) which provided that—

In the event of failure for any two consecutive years either to offer a base property in an application for a license or permit, or to accept a license or permit offered pursuant to such an application, such base property will lose its dependency by use or priority.

After consideration by the advisory board of the appellants' protest to this rejection, the rejection was sustained and the appellants were so notified by the range manager's decision of March 3, 1954. On appeal from the latter decision, a hearing was held on October 6, 1954, at Elko, Nevada, before an examiner. The Clover Livestock Company and Mark Scott were recognized as intervenors.

There was no disagreement at the hearing regarding any of the circumstances relating to Mr. Higley's base and to his applications for grazing privileges in the Clover range unit, and most of these matters were stipulated to before testimony was submitted at the

³ In addition, the W $\frac{1}{2}$ sec. 28, T. 35 N., R. 62 E., representing 24.32 percent of Mr. Higley's base was recognized as supporting the transfer of grazing privileges from Mr. Weeks, but the land in section 28 was not included in Mr. Call's lease and option from Mr. and Mrs. Higley.

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hearing.⁴ The case files of Russel Weeks, Lloyd Higley, and Don C. Call and Lloyd Higley were made a part of the hearing record (Tr. 6).

The appellants did not deny at the hearing that their base property was not offered in an application for grazing privileges for the years 1951 and 1952, but contended that the provisions of 43 CFR 161.6 (c) (9) should not apply because Mr. Higley was physically and mentally incapacitated and unable to take care of his business affairs. They offered evidence to that effect. Counsel for the appellants urged that in interpreting the provisions of 43 CFR 161.6 (c) (9), the Government should follow the rule adopted in many jurisdictions that statutes of limitation do not run against persons under certain disabilities such as incompetency (Tr. 41-43).

The examiner held that the evidence submitted by the appellants was too indefinite to support a finding that Mr. Higley was physically or mentally incapable of conducting his business affairs during 1951 and 1952; that inasmuch as Mr. Higley filed an application for grazing privileges on December 23, 1949, and as the application for the transfer of grazing privileges from Mr. Weeks was signed by Mr. Higley in 1951, Mr. Higley's incapacity could not be regarded as having continued from 1948 through 1951.

With respect to the appellants' contention that because the grazing rights from Mr. Weeks' property were not officially transferred to the Higley base property until July 17, 1951, the application filed on February 11, 1953, was filed within the 2-year period designated in section 161.6 (c) (9), the examiner held that the dependency by use (except as to 5 AUM's) was not impressed on Mr. Higley's base property until July 17, 1951, and the 2-year period specified in section 161.6 (c) (9) of the range code could not begin until then. The examiner concluded that if the appellants' application which was filed on February 11, 1953, had been a proper application, it would have been filed within the 2-year period provided by section 161.6 (c) (9) and the dependency by use of the property would have been preserved. However, another provision of the range code, 43 CFR, 1953 Supp., 161.9 (a), in effect when the appellants' 1953 application was filed provided in pertinent part that:

Each year the regional administrator will set a date for each district in his region prior to which all applications for grazing licenses or permits in the district must be filed. Failure to file applications before such date will result in their rejection for that year unless reasonable justification for a belated filing is shown * * *.

⁴ Transcript of Hearing on October 6, 1954, at Elko, Nevada, on the appeal of Don C. Call and Lloyd Higley from the range manager's decision of March 3, 1954, pp. 6-8. Page numbers hereafter will refer to this transcript unless otherwise indicated.

The examiner held that the appellants' 1953 application was not a proper application because it had not been filed within the time provided by sec. 161.9 (a) and that as the appellants had not appealed from the denial of the application, it was assumed that the ground for the denial was proper. He therefore dismissed the appeal.

The Director affirmed the examiner's conclusion that the evidence was insufficient to find that because Mr. Higley was incapacitated he could not file an application within the time required by 43 CFR 161.6 (c) (a). The Director's decision also affirmed the examiner's decision that the application of February 11, 1953, was not filed within the time required by 43 CFR, 1953 Supp., 161.9 (a), and, as a consequence, the base property lost its dependency by use.

As has already been pointed out, all of the appellants' base property, except the 480-acre tract in sec. 23 which Mr. Higley purchased from Mr. Weeks, consisted of class 2 lands having no dependency by use until after July 17, 1951, when the transfer of privileges from Mr. Weeks was approved. Consequently, with the exception of the 480-acre tract, none of the property could have been offered as base with priority to support an application for a class 1 permit or license before July 17, 1951. Although the 480-acre tract in sec. 23 had a recognized dependency by use to the extent of 5 AUM's before Mr. Higley purchased it, thereafter it was not until July 17, 1951, in the decision approving the transfer application, that the tract was recognized as having priority.⁵ Since after Mr. Higley's purchase of this tract, the earliest date on which it was recognized as having dependency by use was July 17, 1951, there is no reason why, in the circumstances of this case, it should be distinguished from the other base lands here involved for the purpose of determining the time within which it must have been offered as base in order to retain its dependency by use. Accordingly, July 17, 1951, is the earliest date on which any of the property here involved could have been offered as dependent by use in an application for grazing privileges, and the 2-year period within which the base was required to be offered in an application to prevent loss of priority under section 161.6 (c) (9) did not terminate until July 16, 1953.

The Director's decision held that the appellants' application for a license or permit filed on February 11, 1953, more than 5 months before the expiration of the 2-year period designated in section 161.6 (c) (9), was not a proper application because it was filed too late to be considered for allowance for the 1953 grazing season. Contrary

⁵ Mr. Higley offered the tract in his application for 1950 privileges, but the manager's decision of February 20, 1950, did not recognize it as supporting a class 1 demand, and the use authorized during 1950 was temporary and unclassified pending completion of the transfer from Russel Weeks.

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to the statement in the Director's decision, the application of February 11, 1953, was not rejected, but appellant Call was told only that the office was unable to take action on the application at the time. Neither of the appellants was notified that the base land had lost its priority,⁶ and the manager's letter of February 12, 1953, amounted, in effect, to suspending action on the application of February 11, 1953. Surely if the range manager believed that the base had lost its dependency by use when the application of February 11, 1953, was filed, both of the appellants were entitled to plain and prompt notice to that effect, and the application should have been rejected rather than suspended (see sec. 6 (d) of the Administrative Procedure Act, 5 U. S. C., 1952 ed., sec. 1005 (d), and *cf.* appellants' account, *supra*, p. 411, of conversations at the grazing office before February 9, 1953, concerning the filing of an application offering this base).

Without regard to these considerations, however, the conclusion that the appellants' base lost its dependency by use for failure to offer it in an application for 2 consecutive years is subject to other objections.

The regulatory provision (43 CFR, 1953 Supp., 161.9 (a)) providing that the regional administrator will set a date prior to which all applications for licenses or permits must be filed is concerned with applications for use of the range during any given annual grazing season and penalty for failure to file applications before the date set each year may result in their rejection *for that year*. As a late application will be considered if reasonable justification for the late filing is shown, the provision is not mandatory.⁷ It was the appellants' failure to file their 1953 application prior to the date set for filing applications that year which was the basis of the Director's ruling that the appellants' 1953 application was not a proper offering of base within the requirements of 43 CFR 161.6 (c) (9). However, there is nothing in the latter regulation which requires that an application which is filed within the 2-year period must be timely filed for any particular season of use in order to prevent loss of priority of the base. The Director's conclusion assumes that the two regulations here involved must be read together. There is nothing, however, in either regulation requiring or even suggesting that they should be read together. The two provisions were added to the range code at the same time, and nothing in the history of their adoption

⁶ The statement in the manager's letter of February 12, 1953, to appellant Call that no application had been offered on the property since 1949 has no significance as far as loss of priority is concerned, because the base had no recognized priority until July 17, 1951.

⁷ The regulation has been amended since the appellants' 1953 application was filed to provide that applications which are filed late *may* (rather than *will*) be rejected for that year unless satisfactory justification for the late filing is shown (43 CFR, 1957 Supp., 161.9 (a)).

indicates that section 161.9 (a) was intended to modify or to cut down the 2-year period designated in section 161.6 (c) (9) within which base must be offered to preserve its dependency by use.⁸ If the provisions were intended to be read together in such a way that section 161.9 (a) could cut down the 2-year period of time designated in section 161.6 (c) (9), there is no reason why the latter provision should not have specified some time period other than the 2 consecutive years which was adopted, or indicated that in certain circumstances, priority of base property might be lost in a shorter period of time than 2 years.

Moreover, the only penalty for failing to file a timely application under section 161.9 (a) is the possible loss of grazing privileges for one grazing season, whereas failure for two consecutive years to offer base in an application results in the disproportionately much greater sanction of complete loss of dependency by use of base property. There was nothing improper about the appellants' application filed on February 11, 1953, except that it was subject to rejection for range privileges during the 1953 season. It seems incongruous to hold that as a consequence of late filing for the 1953 grazing season, the appellants' base lost its priority. The result in the instant case of reading the two regulations together is anomalous, too, because the 2-year period for offering base to preserve its priority is shortened by more than 5 months.

Inasmuch as the appellants filed their 1953 application for grazing privileges before 2 years had elapsed after their base was recognized as having dependency by use, and as there appears to be no valid reason for holding that the 2-year period may be cut down by the provisions of section 161.9 (a), it is concluded that the appellants' 1953 application preserved the priority of their base within the requirements of section 161.6 (c) (9) and that the Director's decision to the contrary was erroneous.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6795), the decision of the Director, Bureau of Land Management, is reversed and the case is remanded for further action consistent with this decision.

EDMUND T. FRITZ,
Acting Solicitor.

⁸ Both regulations here under consideration were adopted effective September 26, 1942. At the time of adoption, the provisions were numbered 501.6 (c) (9) and 501.9 (a) (see 43 CFR, 1943 Cum. Supp., 501.6 (c), 501.9 (a); for re-numbering of the range code see 43 CFR, 1946 Supp., Part 161, introductory note).

For history of the adoption of these provisions, see memorandum of July 15, 1942, for the Secretary from the Director of Grazing recommending that the range code be amended by the adoption of these and other provisions.

**FLOYD A. WALLIS
THE CALIFORNIA COMPANY**

A-27547

*Decided September 19, 1958****Rules of Practice: Protests**

An oil and gas lease offeror may file a protest against the issuance or existence of a permit which authorizes another to drill slant wells from or through the land he desires to lease.

Mineral Leasing Act: Generally—Rights-of-Way: Act of February 25, 1920

The Secretary of the Interior (or his delegate) is authorized by section 29 of the Mineral Leasing Act to issue a permit for slant wells to be drilled through lands subject to that act, even though the land for which the permit is issued is merely covered by offers to lease for oil and gas, but no leases have been issued.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Floyd A. Wallis has appealed to the Secretary of the Interior from a decision dated June 28, 1957, as amended by a decision dated August 8, 1957, by the Director of the Bureau of Land Management which rejected his petition filed August 9, 1955, for rescission of a permit, BLM-A 039136, to drill slant wells which had been granted to The California Company, effective May 1, 1955, in a decision dated May 10, 1955, of the Eastern States Office.

The permit in essence authorizes The California Company to drill wells from the surface of the permit lands or other lands, the bottoms of which wells are located under lands adjoining the permit lands, with the bores of the wells penetrating and passing through the sub-surface of the permit lands. The lands covered by the permit are unsurveyed lands lying along the banks of the Southwest Pass of the Mississippi River into the Gulf of Mexico.

The California Company holds oil and gas leases from the State of Louisiana for some of the submerged lands in the Southwest Pass adjacent to the permit lands. It appears that it has drilled two wells from the surface which pass through the permit lands and bottom under the State lands. One of these wells has been plugged and the other is presently producing.

These same lands were included within offers to lease for oil and gas, BLM-A 036376 and BLM-A 036377, filed by Henry Morgan on January 27, 1954, and most of them in BLM-A 037435-037439 filed by Wallis on June 2, 1954. The California Company's application was filed on December 20, 1954. On March 8, 1956, Wallis filed

*Not in chronological order.

oil and gas lease offer BLM 042017 for the same lands as were included in his earlier applications.

The conflict between Morgan and Wallis was disposed of in a recent departmental decision, *Henry Morgan et al.*, 65 I. D. 369 (1958), which affirmed the Director's decision of June 7, 1956, rejecting the acquired lands applications and granting priority to Wallis' public land application, BLM 042017. In his decision of June 7, 1956, the Director rejected¹ Wallis' petition on the grounds that the permit was properly granted under section 29 of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 186), and that Wallis had no standing to attack it.

Considering first the latter point, I am of the opinion that it is no valid objection to Wallis' petition to point out that he has no interest in the land and therefore no standing for that reason to attack the permit.

The rules of practice of the Department distinguish between persons qualified to initiate contests and others who may file protests.² Wallis is not claiming the rights of a contestant. As an applicant for a lease, he clearly comes within the category of those from whom the Department has always entertained protests against actions affecting the lands in which they are interested. *Lucille Mines, Inc.*, A-27558 (June 6, 1958); *United States Steel Corporation*, 63 I. D. 318 (1956). Although the grounds on which a protest will be considered may be narrowed by the fact that Wallis' petition came after the issuance of the permit (*U. S. Steel Corporation, supra*, 322-324), the Department can always consider the question of its lack of authority to act no matter how this assertion is brought to its attention. *John J. Farrelly et al.*, 62 I. D. 1, 4 (1955), reversed on other grounds, *Farrelly v. McKay*, Civil No. 3057-55 (D. D. C.), October 11, 1955. Therefore, it was error for the Director to dismiss Wallis' petition on the ground that he had no standing to attack the permit.

The permit was purportedly issued under the authority of section 29 of the Mineral Leasing Act (*supra*), which provides as follows:

That any permit, lease, occupation, or use permitted under this Act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this Act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said

¹ This rejection was made final by the decision of June 28, 1957, which was modified by the decision of August 8, 1957, to permit Wallis to file an appeal.

² 43 CFR, 1954 ed., 221.1, at time petition was filed; now 43 CFR, 1954 Rev. 221.51-221.52 (Supp.).

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Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.³

The appellant contends that the first sentence of this statute merely requires that "any permit, lease, occupation, or use permitted under this Act" reserve to the Secretary the right to permit the easements or rights-of-way listed in it and that only the language of the last proviso gives the Secretary the authority to issue a permit.

This argument proves too much, for if the Secretary derives his authority only from the last proviso, then his authority would be limited only to cases in which *leases* had been issued and would not apply to "any permit * * * occupation, or use * * *" permitted under the Mineral Leasing Act. It must be remembered that the act as originally passed provided for "prospecting permits" rather than "leases" of land not within the known geologic structure of a producing oil or gas field. (Section 13, Mineral Leasing Act, February 25, 1920 (41 Stat. 441).)

The Department has always held that the right to grant easements applied to permits as well as leases. This view is clearly demonstrated in the provisions of the first oil and gas regulations. (Circular 672, March 11, 1920, as amended to October 29, 1920, 47 L. D. 437, 442, par. 9 of permit form.) The same view was expressed in *George W. Harris* (On Rehearing), 53 I. D. 508 (1931); see also Solicitor's opinion, 57 I. D. 478, 482 (1942).

A long-continued and uniform administrative interpretation of a statute is entitled to great weight in its construction. *United States v. Wyoming*, 331 U. S. 440, 454 (1947); *Sykes v. United States*, 343 U. S. 118, 126-127 (1952); *United States v. American Trucking Associations, Inc., et al.*, 310 U. S. 534, 549 (1940).

The most that can be said of the last proviso is that it makes it abundantly clear that even the issuance of as formal a document as a lease does not deprive the Secretary of the authority granted him to issue easements and permits affecting the leased land.

A fair reading of section 29 is that it not only reserves to the Secretary the rights set out therein, but impliedly grants him the authority to exercise those rights in all lands subject to the Mineral Leasing Act, not only after a permit, lease, occupation or use is permitted but prior thereto. The section is not a limitation on the Secretary's authority. It is rather an exercise of caution so that no rights granted

³ The pertinent regulation repeats the language of the statute. 43 CFR 244.67 (a).

one permittee under the Mineral Leasing Act could block other mineral development. Therefore, it is my conclusion that the Secretary (or his delegate) can grant rights under section 29 in lands subject to the Mineral Leasing Act.

The appellant next contends that a slant well drilling permit is neither an easement nor a right-of-way as contemplated by section 29. However, the words of the statute allow "such easements * * * through, or in the lands leased, occupied * * *." A permit to drill a well through land seems to me to clearly come within the scope of the rights the Secretary may grant.

The appellant also argues that rights under section 29 may be granted only for the purpose of developing minerals in lands owned by the United States. Section 29 provides for such easements to be granted as may be necessary or appropriate to the working of the lands subject to the act, and the shipping or the treatment of products thereof "and *for other public purposes*" [italics added]. The final phrase stands alone as a statement of a reason for which the Secretary may permit an easement. It is not limited by any appended phrase as the preceding conditions under which the Secretary may permit easements may be said to be.

The appellant contends that this phrase is limited by the *ejusdem generis* rule to purposes of the same type of those specifically enumerated. Assuming, without deciding, that this interpretation is correct, I believe that the easement granted the appellee falls within the rule. The purposes enumerated are all related to development of the mineral resources of public land. The slant well drilling permit was issued for the purpose of aiding in the development of mineral resources owned by the State in which land is located. This, it seems to me, falls within even the narrow construction of the phrase "for other public purposes." The fact that a private person, as a lessee, also has an interest in the State land does not negate the public purposes underlying the lease. *North Carolina State Ports Authority v. First-Citizens Bank and Trust Co.*, 88 S. E. 2d 109 (N. C., 1955).

Furthermore, the slant well-drilling permit aids, as the Director of the Geological Survey determined, in exploration for oil and gas, which in itself may well be considered a public purpose.

The appellant also urges that The California Company should have filed an application as provided in 43 CFR 244.67 (c), in accordance with the provisions of 43 CFR 244.1-244.21. This contention seems well taken. Apparently The California Company submitted as its application a form of the agreement it desired. However, the permit has been granted, the permittee has expended substantial sums of money under its authority, and there is no indication that the permittee is not qualified to hold the permit or that the failure to comply

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with the regulation has worked to the prejudice of the United States.⁴ In these circumstances, there is no need to cancel the permit. *Cf. United States Steel Corporation*, 63 I. D. 318, 323 (1956); *Columbian Carbon Company et al.*, 63 I. D. 166, 172 (1956).

Finally, the appellant argues that the permit is improvident, contrary to interests of the United States, and violative of the mineral leasing laws. This argument is based upon the theory that the permit could allow the drainage of oil and gas in public lands through a well bottomed close by in adjacent lands without obligation to pay royalty or other compensation to the United States. However, the United States can protect itself against drainage. 30 U. S. C., 1952 ed., Supp. V, sec. 226. The contention that the permit allows The California Company to develop oil and gas deposits in United States lands outside the provisions of the Mineral Leasing Act is groundless. The permittee is exploiting oil and gas deposits in land it has leased from the State and doubtless could do so with or without the permit.

Accordingly, I find that the appellant's objections to the permit are without merit.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

ELMER F. BENNETT,
Solicitor.

ESTATE OF MAE F. LASSLEY,
OSAGE ALLOTTEE NO. 634

IA-882

Decided September 29, 1958

Indian Lands: Descent and Distribution: Wills

Only such person as shall take under the will or a presumptive heir of the decedent under the succession laws of the State of Oklahoma, has such an interest as will permit him to contest the will of an Osage Indian.

A presumptive heir of an Osage Indian, whose relationship to the decedent is too far removed to participate in the estate, has no right to contest the will of such decedent.

Indian Lands: Descent and Distribution: Wills

While an adjudication of a testator's mental incapacity to manage his property is to be considered in the determination of his testamentary capacity, such evidence is not conclusive proof thereof.

⁴In *Henry Morgan et al.*, 65 I. D. 369 (1958), the Department held that Wallis' public land oil and gas offer filed on March 8, 1956, was the first proper one filed for the land covered by the permit. Thus at the time the permittee filed the application, there was no other valid offer affecting the land.

Indian Lands: Descent and Distribution: Wills—Rules of Practice: Hearings

The proponent of an Osage Indian will is not required to offer further evidence after having presented *prima facie* proof.

Indian Lands: Descent and Distribution: Wills

A will devising most of her estate to her church by an elderly woman, whose nearest relative is a cousin, is not an unnatural will.

Indian Lands: Descent and Distribution: Wills

The limitation imposed by statute upon the qualification of heirs of a decedent of one-half or more Osage Indian blood, is not applicable to the devisees under a will of an Osage Indian.

APPEAL FROM THE SUPERINTENDENT OF THE OSAGE INDIAN AGENCY

Sue Beth Lester, through her attorneys, Burt, Seigel & Franklin, has appealed to the Commissioner of Indian Affairs from a decision of the Superintendent of the Osage Indian Agency, dated December 5, 1957, approving the last will and testament, dated November 17, 1955, and the codicil thereto, dated February 25, 1957, of Mae F. Lassley, deceased Osage allottee No. 634.¹ The will and codicil were approved as to form on November 18, 1955, and February 26, 1957, respectively, by Field Solicitor Hugh A. White, in accordance with 25 CFR 17.11 (formerly 83.11).

The testatrix died on September 10, 1957, a resident of Pawhuska, Oklahoma, leaving an estate valued at approximately \$140,000. By her will the testatrix bequeathed to Rosa Hill, described as her first cousin and nearest relative, the sum of \$100, and to Mary Brave the sum of \$500. Family and Indian pictures were bequeathed to the Osage Museum; all of decedent's religious pictures and statuary were bequeathed to Mrs. Josephine Deal; and the sum of \$200 was bequeathed to Charles Whitehorn or to someone who may be designated under the terms of the will, to provide for an Osage Indian ceremonial service and an Indian feast after decedent's death. Of the rest, residue and remainder of her estate the testatrix devised an undivided one-half interest therein to the Immaculate Conception Catholic Church of Pawhuska, Oklahoma, with certain stated provisions; and the remaining one-half interest to the Bishop of the Diocese of Oklahoma City and Tulsa, for certain Masses and the remainder of the income to be used by the bishop for certain shrines and the operation

¹ Under section 8 of the act of April 18, 1912 (37 Stat. 86), adult members of the Osage Tribe of Indians not mentally incompetent may dispose of their restricted estates by will in accordance with the laws of the State of Oklahoma, and subject to the approval of the Secretary of the Interior. The function of approval or disapproval in this respect was delegated to the Superintendent of the Osage Indian Agency under the regulations of the Department (25 CFR 17.12, formerly 83.12). Although section 17.14 of those regulations provides for an appeal from the superintendent's action to the Commissioner of Indian Affairs, and for a further appeal to the Secretary, for administrative reasons the Commissioner of Indian Affairs has referred the present appeal directly to the Secretary of the Interior for action.

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of charities, with particular reference to certain designated institutions. The codicil to the will changed only the name of the party who should arrange for the ceremonial service and feast after the death of the testatrix, by substituting the name of Harry Redeagle for that of Charles Whitehorn. The testatrix confirmed her last will and testament of November 17, 1955, by the codicil, dated February 25, 1957.

A petition for the approval of the will was filed by Robert Stuart, who was named as executor in said will. Objections to the approval of the will were separately filed by Herbert A. Pappin, Rose Neal Hill, and Sue Beth Lester, each of whom claimed to be related to the decedent, alleging that the decedent lacked testamentary capacity, that undue influence was exercised upon her, that she eliminated the natural recipients of her bounty from any consideration to receive any of her property, that the will is an unnatural will, that the purported will and codicil were not drawn, executed, subscribed, or attested in the manner provided by law, that the will is incapable of being performed, and that it contradicts and controverts the policies and regulations pertaining to the control and disposition of Osage personalty, realty, and headrights. Herbert A. Pappin did not file a notice of appeal. A notice of appeal was filed in behalf of Rose Neal Hill but she failed to perfect her appeal as required by 25 CFR 17.14. Therefore, we have for consideration only the appeal of Sue Beth Lester. An answer brief was filed jointly by the executor and the principal beneficiaries, through their attorneys F. W. Files and G. V. Labadie.

It is noted from the will that Rosa Hill is described by the testatrix as her first cousin and nearest relative. The record of the hearing on the will contains a statement by the Field Solicitor, who conducted the hearing, that he had occasion to discuss will matters with the testatrix, at which time she referred to Rosa Hill as her cousin and nearest relative. It appears to be well established that Rosa (Rose) Neal Hill is a first cousin and the nearest relative of the decedent. The evidence adduced at the hearing establishes the relationship of the appellant, Sue Beth Lester, to be a third cousin of the decedent. The Oklahoma law determining the degree of kindred is found in Title 84, Oklahoma Statutes (1951), sections 217, 218 and 221 reading as follows:

Section 217. Degrees of kindred—

The degree of kindred is established by the number of generations, and each generation is called a degree.

Section 218. Lineal and collateral—

The series of degrees from the line; the series of degrees between persons who descend one from the other is called direct or lineal consanguinity; and the se-

ries of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity.

Section 221. Collateral degrees, how reckoned—

In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus brothers are related in the second degree, uncle and nephew in the third degree, cousins german in the fourth degree, and so on.

Therefore, in determining the degree of kindred under the statute, Rose Neal Hill was related in the fourth degree and Sue Beth Lester in the sixth degree.

Had the decedent died intestate, or if the will were not approved, the estate of the decedent would be distributed under the laws of succession of the State of Oklahoma, which, under Title 84, Okla. Stat. Anno., sec. 213, subparagraph sixth, provides as follows:

If the decedent leaves no issue, nor husband, nor wife, and no father or mother, or brother, or sister, the estate must go to the next of kin in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote.

Thus, it appears that in the absence of a will, the decedent's entire estate would have descended to Rose Neal Hill.²

Under the Department regulations pertaining to wills of Osage Indians,³ and under the Oklahoma State law,⁴ only an interested person may contest a will. If a person can in no event participate in the distribution of a decedent's estate either as a devisee under a will or as an heir under the laws of succession, then that person cannot be heard in a contest of the decedent's will.⁵ Any interest of the appellant, Sue Beth Lester, is too far removed to establish her right to contest the will of Mae F. Lassley. Since she has no right of inheritance under the State law and is not named in decedent's will, she is a stranger to the proceeding.

Notwithstanding the procedural deficiencies of the appeal herein, we have reviewed the record of the hearing and the appeal of the appellant, Sue Beth Lester, but find no basis for reversing the action of the superintendent in his approval of the will and the codicil. It appears that the proponents of the will did make *prima facie* proof that the will was properly drawn, executed, and attested. The evidence as presented in that behalf was competent, and given by reliable wit-

² *In re Felgar's Estate*, 133 Okla. 289, 272 P. 2d 453 (1954).

³ 25 CFR 17.3.

⁴ Title 58, Okla. Stat. Anno., sec. 29.

⁵ *In re Harjoche's Estate*, 193 Okla. 631, 146 P. 2d 130 (1944); *McCoy et al. v. Lewis et al.*, 166 Okla. 245, 27 P. 2d 350 (1933).

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nesses. An attempt to impeach the attesting witnesses' testimony by the testimony of an attendant of the decedent was not conclusive, and did not serve to discredit the attesting witnesses. The attendant, Mae Prendergrass, testified that she was called upon to hold, what she believed to be, the will for the testatrix to sign, while only she, the testatrix and the scrivener of the will were present, and that she did not see the attesting witnesses present at any time. However, this witness was not able to identify the document held by her and signed by the testatrix as being the last will and testament of the testatrix placed in evidence. It is noted that even should the will lack a proper execution, it was specifically confirmed by the codicil thereto, which was also executed in accordance with all of the necessary requirements.

It was stipulated into the record that the decedent's certificate of competency was revoked in 1932 for the reason that she was squandering and misusing her funds, and that there had not been any change in the status of her competency up to the date of her death. While an adjudication of a testator's mental incompetency to manage his property is to be considered in the determination of his testamentary capacity, such evidence is not conclusive proof thereof.⁶

The appellant contends that from the testimony of Mrs. Florence Smith, it is inferred that Mr. Stuart, the scrivener of the will, at the time of the execution of the codicil, refused to grant the request of the decedent to make a new will, and stated that the will he had already prepared took a lot of time and effort, and that it was all right the way it was. We cannot infer from Mr. Stuart's purported statement that he refused to prepare a new will. A codicil had been prepared to make the only change requested by the testatrix, which was a simple change not requiring the preparation of an entirely new document, and it appears that the testatrix was satisfied with the advice of Mr. Stuart when she executed the codicil.

It is pointed out by the appellant that Mr. Robert Stuart, the scrivener of the will, was sworn as a witness with others on behalf of the proponents. It is also contended that Mr. Stuart did not testify and that the conspicuous absence of his testimony to clarify some very seriously disputed points concerning the attestation and execution, as well as the publication of the will, seem to speak for themselves by the utter complete and absolute refusal by him to testify at all. However, the record discloses no refusal by Mr. Stuart to testify. We see no need for Mr. Stuart presenting himself as a witness when *prima facie* proof had been made. On the other hand, the contestants could have called him as a witness had they so desired, since he was present

⁶ *In re Wheeling's Estate*, 198 Okla. 81, 175 P. 2d 317 (1946); *In re Shipman's Estate*, 184 Okla. 56, 85 P. 2d 317 (1938); *In re Nitey's Estate*, 175 Okla. 389, 53 P. 2d 215 (1935).

at the entire hearing, but there is no indication they attempted to do so.

It is further contended that the circumstance of Mr. Stuart's being a member of the Board of Trustees of the Catholic Church in Pawhuska and the named executor of the will places him in the same situation as a scrivener who is also a beneficiary thereunder, and which then gives rise to the presumption of law that undue influence was used to procure the will, placing the burden on such beneficiary to show the contrary. We do not believe that Mr. Stuart's affiliations with the church or his position as executor of the will gives to him such a beneficial interest as would raise the presumption of undue influence. His church affiliations give him no direct benefit from the will and his being named as executor has no significance other than an expression of desire on the part of the testatrix to have her affairs administered by one in whom she puts her confidence and trust.⁷

The appellant infers that Robert Stuart, the scrivener of the will and a member of the same church, was very close to the testatrix, that he visited frequently at her home, and did many errands for her, which circumstances raise the question of whether under these facts the burden was cast upon the proponent of the will to prove that no undue influence was used in the procurement of the will naming the church as the principal beneficiary. In support of this contention appellant cites New York cases holding that where a spiritual adviser procures a will to be drawn and superintends its execution, whereby a church in which he is interested is benefited, the presumption of undue influence would arise to require proof of spontaneity or volition to repel it.⁸ There is no evidence appearing in the record showing that Robert Stuart was in any manner a spiritual adviser of the testatrix, or that he discussed church matters with her, or performed any services for her other than legal, or that their relations were anything except that of attorney and client. The cases cited are not applicable to the circumstances of this case.

The decedent's attending physician, who had treated her over a period of 10 years, testified that although the decedent was bedridden with arthritis and at times suffered from pain, she was alert at all times and did not appear to have any mental deficiencies.

It is further contended by the appellant that the unnaturalness of the will is obvious in that she completely disregarded her next of kin, and left the vast majority of her estate to the Catholic Church and its various components. Her nearest relative was her cousin, Rose Neal Hill, who was remembered by a token devise in the will. It appears from the evidence adduced at the hearing that decedent believed

⁷ *Kindt v. Parmenter et al.*, 83 Okla. 116, 200 P. 706 (1921); 57 *Am. Jur.*, Wills, sec. 402.

⁸ *In re Welsh*, vol. 1, Redfield (N. Y.), p. 238; *Marx v. McGlyren*, 4 Redfield (N. Y.), p. 455.

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Rose Neal Hill to have independent means and was not in need of property from the decedent's estate. The testatrix by her will has shown that she had in mind her nearest relation. She, no doubt, received spiritual comfort by her devise to her church, which was a natural distribution made by an elderly person suffering from a painful illness for many years, without closer kin than a first cousin.

Appellant finally contends that the Federal laws and regulations pertaining to the estates of Osage Indians are thwarted by the admission to probate of an instrument such as is involved in this case. In pursuit of this contention she states that the laws are fixed, set up, and regulated for the purpose of preserving the Osage estates within and for the Osage Tribe and the respective members thereof. While it is true that regulatory laws were enacted to reserve certain underlying wealth of Osage lands to the use of the Osage Tribe,⁹ and a limitation of heirs who may inherit from those who are one-half or more Osage Indian blood,¹⁰ the right given to an Osage Indian to dispose of his property by will does not similarly restrict his manner of devise nor define or limit his beneficiary.¹¹

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509, as revised; 17 F. R. 7243), the action of the Superintendent of the Osage Indian Agency approving the last will and testament dated November 17, 1955, and the codicil thereto, dated February 25, 1957, of Mae F. Lassley, deceased Osage Allottee No. 634, is affirmed, and the appeal is dismissed. The will and codicil should be delivered to the appropriate county court in Oklahoma for further proceedings in accordance with applicable law.

EDMUND T. FRITZ,
Acting Solicitor.

FRANCO WESTERN OIL COMPANY ET AL.

A-27607 (Supp.) *Decided September 30, 1958*

Administrative Practice—Oil and Gas Leases: Extensions—Statutory Construction: Administrative Construction

Where the Department places a different interpretation on an act of Congress from that previously adopted, its decision announcing the new interpretation of the statute is to be given prospective application only and actions previously taken in extending oil and gas leases under the overruled interpretation of the statute will not be disturbed.

⁹ Act of June 28, 1906 (34 Stat. 539), as amended.

¹⁰ Sec. 7 of act of February 27, 1925 (43 Stat. 1008), as amended by the act of September 1, 1950 (64 Stat. 572).

¹¹ Sec. 8, act of April 18, 1912, fn. 1.

SUPPLEMENTAL DECISION

In a memorandum dated September 23, 1958, the Acting Director, Bureau of Land Management, requested clarification of the departmental decision of August 11, 1958, on the appeal of *Franco Western Oil Company et al.*, 65 I. D. 316, insofar as that decision may affect noncompetitive oil and gas leases extended under an interpretation of section 30 (a) of the Mineral Leasing Act, as amended by the act of July 29, 1954 (30 U. S. C., 1952 ed., Supp. V, section 187a), which interpretation was overruled in the decision of August 11, 1958.

The previous interpretation of the statutory amendment was contained in an opinion (M-36443) dated June 4, 1957 [unreported] of the Associate Solicitor, Division of Public Lands, and was to the effect that partial assignments of noncompetitive oil and gas leases, issued and extended under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. V, sec. 226), filed and approved on the last day of the extended 5-year term would effectively extend the terms of the segregated leases of undeveloped lands for 2 years and so long thereafter as oil or gas is produced in paying quantities.

The Acting Director states that leases were extended in the interim between the opinion of the Associate Solicitor of June 4, 1957, and the decision of August 11, 1958, on the basis of the Associate Solicitor's interpretation of the amendment, in cases where partial assignments were filed during the last month of the extended terms of such leases. He states that he has had many inquiries from holders of such leases and others as to the status of those leases in view of the holding in the *Franco Western* case that a partial assignment of an oil and gas lease in its extended 5-year term under section 17 of the Mineral Leasing Act, as amended, filed during the last month of the extended term cannot become effective to segregate the assigned and retained portions of the base lease and thus entitle either the assignor or the assignee to separate leases and to the further 2-year extension afforded by the 1954 amendment of section 30 (a) of the Mineral Leasing Act.

It has not been the practice of the Department to give its decisions retroactive effect so as to disturb actions taken in other cases on an overruled interpretation of the law. Nor is there anything in the decision of August 11, 1958, which indicated that other leases which, prior to that date, had been extended under the theory that leaseholders could file partial assignments of their extended leases during the 12th month of the 10th year of their leases and thus be entitled, if the assignments were approved, to the 2-year extension afforded by the 1954 amendment, would be subject to attack by the Department.

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The decision of August 11, 1958, represents what the Department now believes to be the correct interpretation of the law. This was the first occasion in which the Department was called upon to reexamine the Associate Solicitor's opinion in an actual case arising under the 1954 amendment and brought to the attention of the Department by way of appeal. That, upon re-examination, it took a different view of the law from that expressed in the opinion does not require that leases extended under the interpretation expressed in the opinion be disturbed.

The Department has, in the past, overruled its former holdings without in any way nullifying actions taken under its previous decisions.¹ In fact, the rule applied by the Department on those occasions when it has specifically considered the question as to whether, because of a change in the interpretation of a statute, its holding should have retroactive effect, has been to deny such effect to its decisions.

Thus, in considering the question whether the Department could construct ditches and canals across lands which, in 1890, were in a tribal status but which were thereafter allotted in severalty to individual Flathead Indians, the Solicitor, in an opinion approved by the Secretary, 58 I. D. 319 (1943), recognizing that for more than 50 years the Department had construed the act of August 30, 1890 (43 U. S. C., 1952 ed., sec. 945), as authorizing it to reserve rights-of-way for ditches and canals across such individually allotted lands, adopted a different view of the application of the act to those lands and urged abandonment of the practice theretofore followed of taking Indian lands for rights-of-way without paying compensation therefor. In the course of his opinion, the Solicitor said:

This, however, does not imply that actions taken in past years upon the basis of an abandoned theory are now to be considered redressible wrongs. At no time was the past administrative interpretation of this statute so unreasonable that a court could be induced to give relief against its consequences.² All that this opinion implies is that there is a realm of administrative discretion within which courts will not interfere, and within which administrative authorities may modify views which turn out to be unwise without thereby raising a host of *ex post facto* claims against the Government.

The fiction that interpretation of laws reveals their eternal meaning has long stood in the way of any such distinction between the prospective and the retrospective application of decisions. But in recent years a more realistic view of the matter has achieved respectability. The Supreme Court has made it clear that nothing in the Federal Constitution or in the nature of the legal process prevents a tribunal from recognizing changing circumstances and laying down a rule for the future different from the rule which it has sustained for the past.

¹ See *Timothy Sullivan, Guardian of Juanita Elsenpeter*, 46 L. D. 110 (1917), overruling *Heirs of Susan A. Davis*, 40 L. D. 573 (1912); *Bertha M. Birkland*, 45 L. D. 104 (1916); and *Lillie E. Stirling*, 39 L. D. 346 (1910). See *Instructions*, 35 L. D. 549 (1907).

Thus the Supreme Court has upheld the validity of a State court decision which lays down for the future a rule different from that applied in the past.²⁵ The Supreme Court itself has, on occasion, laid down a new rule of law for the future while recognizing the propriety of a different rule in the past.²⁶ The Supreme Court has likewise recognized the propriety of an administrative decision which lays down a new rule for the future without detracting from the validity of a different rule applied in the past.²⁷

²⁴ Cf. opinion of Supreme Court in *Sioux Tribe v. United States*, 316 U. S. 317 (1942) * * *.

²⁵ *Great Northern Railway v. Sunburst Co.*, 287 U. S. 358 (1932).

²⁶ *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243 (1940); *Reconstruction Finance Corp. v. Prudence Securities Advisory Group*, 311 U. S. 579 (1941).

²⁷ *American Chicle Co. v. United States*, 316 U. S. 450 (1942). * * *.

The same principle was applied when the Department had for consideration the question of the proper interpretation to be placed on section 1 of the act of July 29, 1942 (56 Stat. 726), as amended by the acts of December 22, 1943 (57 Stat. 608), and September 27, 1944 (58 Stat. 755), granting preference rights to new leases under the Mineral Leasing Act to oil and gas lessees where the lands were not, on the expiration date of the leases, on the known geologic structure of a producing oil or gas field and extending those leases for which no preference right to a new lease was granted.

There (58 I. D. 766 (1944)) the Department adopted the view that the legislation granted a preference right to a new lease only with respect to that portion of the lands outside a known producing structure on the date of the expiration of the lease and that only with respect to that part of the lands within a known producing structure on the date of the expiration of the lease was the lease automatically extended. Recognizing that many lessees had construed the provisions as automatically extending their entire leaseholds, despite the fact that part of the lands covered by their leases were outside the known geologic structure of a producing field on the expiration date of their leases, and accordingly had neglected to file applications for preference-right leases, the Department held that its interpretation of the law should be given prospective application only and should not be applied to a lease which, under the construction of the legislation there adopted, had already expired. It held that such a lease should be treated as if extended in its entirety.

Thereafter, an applicant for a noncompetitive oil and gas lease on land not within a producing structure covered by such an extended lease appealed from the rejection of her application, contending that merely because the Department did not so construe the legislation until December 6, 1944, the Department could not give its interpretation prospective effect only and that the legislation had the meaning ascribed to it in 1944 from the time of its enactment and not from the time the Department so construed it. In *Anna R. Pahl*, A-24350 (April 4, 1947), the Department held that it was proper to give

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future effect only to its ruling. The position of the Department was upheld in 1951, by the United States District Court for the District of Columbia in *Anna R. Pahl v. Marion Clawson, Director of the Bureau of Land Management, and Oscar L. Chapman, Secretary of the Interior*, Civil No. 3309-48, unreported.

Applying the above rule to those leases which were, prior to August 11, 1958, extended for a further 2-year period and so long thereafter as oil or gas is produced in paying quantities on the basis of assignments filed during the 12th month of the 10th year of the leases, those leases, all else being regular, will be considered as having been properly so extended.

The decision of August 11, 1958, has the effect of shortening by one month the time in which partial assignments of leases already in their extended term can be filed in order to take advantage of the benefit conferred by the 1954 amendment. At the time the decision was made, certain leases were undoubtedly in their 12th month of the 10th year and lessees who intended to make partial assignments had, under the overruled interpretation, until August 29, 1958 (the last day of the month in which the land offices were open for the transaction of business) within which to file such assignments. As the 11th month of the 10th year of those leases (not later than which, under the decision of August 11, 1958, partial assignments must be filed) had already elapsed, a holding that assignments filed after the date of the decision, but during the month of August, could not become effective would be unsound. This is so because it would, in effect, deprive such parties of a right to which they were entitled under the Associate Solicitor's opinion. In the circumstances, partial assignments of leases in the 12th month of their 10th year in August 1958, filed on or before August 29, 1958, will be recognized.

This leaves for consideration the action taken in the decision of August 11, 1958, with respect to the Hagood lease (Los Angeles 087429). There it was held that the lease terminated on June 30, 1957, that the partial assignment to the Savoy Petroleum Corporation never took effect, and that the offers of Franco Western Oil Company and Raymond J. Hansen should not have been rejected.

Upon further consideration, it must be held that L. N. Hagood and the Savoy Petroleum Corporation are as much entitled to have the assignment honored as are those others whose leases are considered to have been properly extended.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), that part of the decision of August 11, 1958, which held that the land involved in that case was available for oil and gas leas-

ing on July 1, 1958, when the offers of Franco Western Oil Company and Raymond J. Hansen were filed is vacated and the decision is modified to recognize the propriety of the action taken in extending the Hagood lease. Therefore, those two offers must be and are hereby rejected.

EDMUND T. FRITZ,
Acting Solicitor.

MRS. DORA TOWNSEND ET AL.

A-27661

Decided October 6, 1958

Oil and Gas Leases: Overriding Royalties

Where the average production of oil from a leasehold is 15 barrels per well per day or less, and the aggregate of the overriding royalties from production and the royalty payable to the United States exceeds that specified by departmental regulation 43 CFR 192.83, the lease is properly held to be in default if the overriding royalties are not reduced in accordance with 43 CFR 192.83.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Dora Townsend, William E. Lake, and the Federal Oil Company have appealed to the Secretary of the Interior from a decision of January 22, 1958, by the Director of the Bureau of Land Management which affirmed a decision of the manager of the Cheyenne, Wyoming, land office requiring a reduction in overriding royalties in oil and gas lease Buffalo 028328 (d) and which, in addition, held the lease to be in default. The lease is a 10-year renewal lease dated June 1, 1950, covering 120 acres of land described as the SE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15, T. 46 N., R. 64 W., 6th P. M., in Osage field, Weston County, Wyoming.

The Federal Oil Company, lessee and operator under the lease, applied, in a letter dated September 29, 1955, to the oil and gas supervisor, Geological Survey, Casper, Wyoming, for a reduction in the royalties due and payable to the United States under the lease. A statement of income and expenses for the year ending July 31, 1955, submitted with the application showed a deficit of \$2,548.95 after payment of royalties, production expenses, and administrative and general expenses in the operation of this lease. There are 5 producing wells on the leased land and production from these wells during the period from October 1, 1954, through September 1957 was not more than 9 barrels of oil per well per day. An overriding royalty of 7 $\frac{1}{2}$ percent on the production from the SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15 is held by Mrs. Townsend and a 7 $\frac{1}{2}$ percent overriding royalty on production from the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15 is held by Lake.

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In a decision of July 26, 1956, the manager denied the lessee's request for a reduction in royalty payable to the United States under the lease, notified the parties in interest that the present overriding royalties constitute a burden on the operation of the lease prejudicial to the interests of the United States, and required that the overriding royalties be reduced to the limits prescribed in 43 CFR 192.83.¹ The decision mentioned that there was no indication that any substantial reduction in the administrative and general expenses had been attempted in connection with operating the lease and indicated that such expenses should be reduced before a reduction in the royalty rate prescribed in the lease would be considered. The manager's decision was based upon recommendations contained in a memorandum of June 7, 1956, by the Director of the Geological Survey after full consideration of all the factors involved in Federal Oil Company's application.

Mrs. Townsend appealed from the manager's decision on the grounds that her contractual right to receive 7½ percent overriding royalty, created approximately June 25, 1930, could not be terminated under a regulation passed at a later date, and that the manager had no authority to change such contractual right.

The Director's decision pointed out that the lease here involved was issued pursuant to section 17 of the Mineral Leasing Act (41 Stat. 437) authorizing the renewal of 20-year leases for successive periods of 10 years "upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods." The decision held that the regulation, 43 CFR 192.83, limiting the allowable amount of overriding royalties is a reasonable requirement, and that since the rights of overriding royalty holders are contingent upon the lease, the holders of such interests are bound by all of the terms of the lease and of any renewal leases, including reasonable conditions required in granting the renewal lease, and accordingly affirmed the requirement that the overriding royalties should be reduced to 5 percent of production when the average production per well per day is

¹ Section 2 (s) of the lease provides that if and when necessary overriding royalties under the lease may be reduced to conform to the requirements of section 192.83 of the regulations.

43 CFR 192.83 provides in pertinent part:

"Any agreement to create overriding royalties or payments out of the production of any lease which, when added to overriding royalties or payments out of production previously created and to the royalty payable to the United States, aggregate in excess of 17½ percent shall be deemed a violation of the terms of the lease unless such agreement expressly provides that the obligation to pay such excess overriding royalty or payments out of production shall be suspended when the average production per well per day averaged on the monthly basis is (a) as to oil, 15 barrels or less * * *. The limitations in this section will apply separately to any zone or portion of a lease segregated for computing Government royalty."

15 barrels of oil or less. The decision held further that as 43 CFR 192.83 provides that an agreement to pay excess overriding royalties shall be considered a violation of the terms of the lease unless the agreement expressly provides that the obligation to pay excess overriding royalty shall be suspended when the average production is 15 barrels per well per day or less, the lease here involved is in default; and if the royalty holders fail to cure the default by submitting evidence of an agreement to reduce the overriding royalty to the allowable maximum, action may be instituted to cancel the lease should such default continue for 30 days (30 U. S. C., 1952 ed., Supp. V, sec. 188).

The Federal Oil Company has appealed only from that part of the Director's decision which held that if the parties in interest failed to submit evidence within 30 days that they have agreed to reduce the excessive overriding royalties to not more than 5 percent of the value of production when average production is less than 15 barrels of oil per well per day, action may be instituted to cancel the lease. The company asserts that it is legally bound to pay the royalties, and that the lessee should not be charged with the violation of the lease as a result of paying royalties in accordance with a decree of the United States District Court for the District of Wyoming.

Information in the record indicates that on April 25, 1952, judgment was entered in the case of *William E. Lake v. Federal Oil Company*, No. 3434 Civil, in the District Court of the United States for the District of Wyoming, by a decree which held in part that William E. Lake was the owner of $7\frac{1}{2}$ percent overriding royalty interest in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 15, T. 46 N., R. 64 W., 6th P. M., covered by United States oil and gas lease Buffalo 028328 (d) under which the defendant was lessee, and that the plaintiff was entitled to be paid $7\frac{1}{2}$ percent of the proceeds resulting from the sale of all oil produced, saved and marketed from the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said section 15, under the terms of the lease. As the court decree provided that Lake was entitled to overriding royalties "*under the terms of said lease*" (italics added), and one of the terms of the lease provides for the reduction of overriding royalties if and when necessary to conform with 43 CFR 192.83 (see note 1, *supra*), the requirements of the Director's decision are not inconsistent with the court order, and the Federal Oil Company's objection to the Director's decision cannot be sustained.

Mrs. Townsend's appeal from the Director's decision asserts that the requirement that overriding royalties be reduced will not materially benefit the United States or the Federal Oil Company and will inflict undue hardship on her. In support of this assertion, it is stated that Mrs. Townsend is an elderly widow whose only means of support

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other than annual social security payments amounting approximately to \$600 is apparently the income from the royalty interest which she holds, and that the difference between the $7\frac{1}{2}$ percent royalty and 5 percent royalty means a great deal to her. It was pointed out in the Director's decision that if overriding royalties are not reduced, continued operation of the lease may be impaired, premature abandonment of the wells may result, and it is also possible that the lease may be canceled. In the circumstances, where the lessee shows a deficit in the operation of the lease, an agreement by overriding royalty holders to a reduced royalty during periods of low oil production from the leasehold would seem less detrimental to their interests than the consequences of failing to reach such an agreement. In any event, there is no authority to waive the provisions of section 192.83 in consideration of the financial circumstances of individual overriding royalty holders.

Lake's appeal from the Director's decision asserts that the daily average production from the two wells in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15 in which he is the owner of a $7\frac{1}{2}$ percent overriding royalty has been in excess of 15 barrels per day and that the production figures showing daily average production of not more than 9 barrels of oil per well per day result from marginal or minimal production from the other three wells on the leasehold. He apparently recommends the abandonment of these three wells, asserts that the costs and expense of operation and overhead costs by the present lessee are excessive and are a substantial contributing factor prejudicial to the interests of the United States, and requests that these matters be considered before deciding this appeal.

In an answer to Lake's appeal, the Federal Oil Company asserts that the average daily production from the two wells in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15 ranged from 10.17 to 12.28 barrels during the calendar years 1956 and 1957. This has not been refuted by Lake.

In any event, the matters raised by Lake presumably received consideration by the Geological Survey before making recommendations with respect to Federal Oil Company's application for reduction in royalties.

For the reasons discussed herein, none of the appeals in this case present a basis for modifying the Director's decision, and a review of the entire record discloses no error in that decision.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

**ESTATE OF WOOK-KAH-NAH,
COMANCHE ALLOTTEE NO. 1927**

IA-855

*Decided October 21, 1958***Indian Lands: Descent and Distribution: Wills**

The previous wills of a testator need not be considered when his last will revokes all former wills and no proof is offered to show that the last will was invalid.

Indian Lands: Descent and Distribution: Wills

The testimony of an attesting witness to a will, who tries to impeach the mental capacity of the testator and the due execution of the will is entitled to little credence and should be viewed with suspicion and caution.

Indian Lands: Descent and Distribution: Wills

Funds paid to an Indian from his individual money account, upon payment, become nontrust property no longer subject to the jurisdiction of the Department of the Interior. The Examiner of Inheritance has no jurisdiction to determine the use of such funds or to order an accounting of the disposition of the funds paid to the Indian from his individual account.

Indian Lands: Descent and Distribution: Wills

An adjudication of a testator's mental incompetency to manage his property is to be considered in the determination of his testamentary capacity, but such evidence is not conclusive proof thereof.

Indian Lands: Descent and Distribution: Wills

Testamentary capacity is a state of mental capacity of the business then ensuing, to be able to bear in mind in a general way the nature and situation of the property, to remember the objects of the testator's bounty, and to plan or understand the scheme of distribution.

Indian Lands: Descent and Distribution: Wills

An anticipated refund of taxes paid from the individual account of an Indian, when received, will be included in the estate as omitted property in accordance with 25 CFR 15.31 and the original order of distribution need not be stayed, reconsidered or amended pending the receipt of such a refund.

APPEAL FROM AN EXAMINER OF INHERITANCE

BUREAU OF INDIAN AFFAIRS

Maud Red Elk, Eula Sue Kaniatobe, George Homovich, Bessie Karty, Leon Taunah, and Ilena Floy Kosechata, through their attorneys William J. Powell and Ames, Daugherty, Bynum & Black, have appealed to the Secretary of the Interior from a decision of the Examiner of Inheritance dated December 14, 1956. The Examiner's decision denied a petition for a rehearing in the matter of the estate of Wook-Kah-Nah, deceased Comanche Allottee No. 1927, who died

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testate on February 23, 1956, at an age of about 80, a resident of Oklahoma, leaving a restricted estate valued at \$426,150.08.

The Examiner of Inheritance, by an order dated August 17, 1956, approved the decedent's last will and testament, dated February 20, 1954, and decreed a distribution in accordance with the will. The heirs of the decedent had been previously determined by the county court of Cotton County, Oklahoma, in Cause No. 1627, in the probate of the decedent's unrestricted estate, which record was by stipulation included in the record of this case. The decedent left surviving the following heirs at law, determined in accordance with the laws of the State of Oklahoma, whose shares in the estate, had she died intestate, would be:

Maud Red Elk, daughter-----	2/14
Eula (Ula) Sue Kaniatobe, daughter-----	2/14
George Homovich, son-----	2/14
Bessie Karty, daughter-----	2/14
Jane Asenap, daughter-----	2/14
Wilfred Tabbytite, son-----	2/14
Leon Taunah, grandson-----	1/14
Ilena Floy Kosechata, granddaughter-----	1/14

By her will the decedent devised to her daughter, Jane Asenap, the north one-half of her own allotment and her inherited interest in lands located west of Walters, Oklahoma. To her son, Wilfred Tabbytite, she devised the south one-half of her own allotment and her interest in the land she had inherited from her father. All of the land that decedent had inherited from her deceased husband was devised in equal shares to her daughter, Bessie Karty, and her son, George Homovich. To her son, George Homovich, she also devised the land she had acquired by inheritance from her mother. Another parcel of land was devised by the testatrix to her grandson, Don Karty. The testatrix specifically and purposely excluded her daughter, Flora Taunah, from participation of her estate, for the reason that Flora had considerable money and property in her own right. Flora Taunah, who died June 25, 1954, was the mother of the appellants, Leon Taunah and Ilena Floy Kosechata. The testatrix devised to her children, Bessie Karty, Jane Asenap, Ula Sue Kaniatobe, Maud Red Elk, George Homovich, and Wilfred Tabbytite in equal shares, all money that she owned at the time of her death, which was in the amount of \$63,300.08. Testatrix named her daughter, Bessie Karty, as residuary devisee.

A petition for rehearing filed by the appellants was denied by an order of the Examiner, dated December 14, 1956. In their petition

for rehearing and now in their appeal, the protestants of decedent's will contend that one or more earlier wills purported to have been made by the decedent, at the direction of the proponents of her last will now under consideration, are in existence and should have been considered; that the proponents of the last will are indebted to the estate of the decedent in the sum of approximately \$250,000, obtained from the decedent prior to the appointment of her guardian, of which no accounting has been made; that such accounting and the collection of funds due the estate are essential to be completed before a proper distribution can be made; that one of the proponents of decedent's last will, Jane Asenap, and others filed a petition, No. 1513, in the county court of Cotton County, Oklahoma, on September 12, 1953, under oath, alleging that Wook-Kah-Nah was mentally incompetent and upon a hearing, the court legally declared her to be incompetent and appointed a guardian and that she was not thereafter legally determined to be competent; that gross undue influence was used upon the decedent at the time of the making of her will and prior thereto by the proponents, Jane Asenap and Wilfred Tabbytite; that since the hearing and the determination thereon by the Examiner, important new evidence has been discovered as contained in the affidavits of Shannon Wahnee, who acted as interpreter in the preparation of a previous purported will of the decedent and as contained in the affidavit of George Coosewoon; and that the will was not executed and witnessed in accordance with the law, was invalid and not subject to be admitted to probate. An amendment to the petition for rehearing was filed whereby it is contended that in the probate proceedings of the unrestricted assets of the decedent's estate, by the county court of Cotton County, Oklahoma, the administrator with the will annexed, appointed therein, was formerly employed as an attorney for the proponents and was also employed to represent them in the appointment of a guardian for Wook-Kah-Nah in the county court, and was thereby informed that the proponents had disposed of more than a quarter of a million dollars of the decedent's money during the years 1951, 1952, and 1953, whereby they were indebted to the estate of the decedent but that the said administrator with the will annexed has made no attempt to collect said funds, to determine the amounts due or to establish a claim against the inheritance of the proponents, Jane Asenap or Wilfred Tabbytite, for the protection of the other heirs. A similar contention is made in the appellants' notice of appeal, including, however, an additional allegation that subsequent to the order approving the will and decreeing a distribution, it was discovered by the appellants that the Department of the Interior had paid to the Federal Government in excess of \$187,000 in income taxes, and to the Oklahoma Tax Commission about \$6,000 on income, and

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that such income for which these taxes were paid was determined by the Supreme Court of the United States in 1956 not to be taxable, whereupon the Bureau of Indian Affairs had recently filed a claim for a recovery of these funds. Appellants further contend that before it may be determined if the funds when recovered are omitted property, it will be necessary to determine whether said funds are under the jurisdiction of the Examiner of Inheritance or under the jurisdiction of the administrator with the will annexed, appointed by the county court of Cotton County, Oklahoma.

It appears from the evidence adduced at the hearing that the decedent, Wook-Kah-Nah, a Comanche Indian, was unable to speak any language other than Comanche and understood only a few words of English, was almost totally blind and was unable to read or write. She was possessed of her own allotment and several parcels of restricted land which she had inherited. Oil was discovered on Wook-Kah-Nah's own allotment in 1946, whereupon all of the proceeds from the royalties and income therefrom were held in trust by the Bureau of Indian Affairs in her individual Indian account, and after June 27, 1951, were paid out to her from time to time as she requested, in accordance with the provisions of 25 CFR 104.3 (formerly 221.3). During the years 1951, 1952, and 1953, sums totaling in excess of \$200,000 were withdrawn from Wook-Kah-Nah's individual account upon her written requests made over her thumbmark. From the money received, Wook-Kah-Nah made purchases of land for each of her children, and from time to time gave each of them sums of money, with the possible exception of Flora Taunah. Her generosity in this regard greatly favored her daughter, Jane Asenap, and her son, Wilfred Tabbytite. These two children were her youngest, neither owning any property except as was given to them by their mother. The other children of Wook-Kah-Nah had inherited properties or received substantial devises from the estates of their father and their brother, Herbert Homovich. Upon the petition of several of the children, the county court of Cotton County, Oklahoma, on September 21, 1953, appointed Funston Flanagan to act as guardian for Wook-Kah-Nah to conserve and look after her unrestricted property, which was the money received from her restricted trust funds, distributed from her individual money account by the Anadarko Indian Office. A budget was prepared whereby the approximate sum of \$3,000 was withdrawn each month from her money account from which substantial amounts were paid to the children as requested by Wook-Kah-Nah.

The contention of the appellants that the previous wills of Wook-Kah-Nah should have been considered at the hearing was well an-

swered by the Examiner in his order denying the petition for rehearing in which he concluded that since the will of February 20, 1954, being considered in this case contains a revocation clause revoking all former wills made by the decedent, there would have to have been proof offered to show that the will of February 20, 1954, was invalid before any proof of former wills could be considered. No such proof was given at the original hearing and the evidence sought to be introduced as contained in the petition for rehearing is insufficient to change the decision. Therefore, all former wills having been revoked by the will of February 20, 1954, it was not necessary to consider them.

In the appeal it is contended the wills disregarded by the Examiner had so many inconsistencies that it was evident the decedent was incompetent to make a will at the time of the making of any of said wills, and that great undue influence was exerted upon her. To support the contention of the appellants, there is included with their petition for rehearing an affidavit by Shannon Wahnee, who acted as interpreter and witness to a purported will in October 1948. His affidavit contained statements indicating that Wook-Kah-Nah was being influenced by her daughter Jane, who was present at the making of the will. The affiant also expresses an opinion that Wook-Kah-Nah was not capable of understanding what she was doing when the will was made. We do not consider that matters occurring in 1948 can be given much probative value to prove the invalidity of a will made in 1954. This is especially so since the suggested evidence results from the statements made by an attesting witness to the 1948 will. The testimony of an attesting witness who tries to impeach the mental capacity of the testator and the due execution of the will is entitled to little credence and should be viewed with suspicion and caution.¹

In their response to the petition for rehearing, the proponents of the will of February 20, 1954, included the affidavit of Samuel Mullen who also acted as attesting witness to the will of Wook-Kah-Nah in 1948. The affiant refutes the statements made by the affiant Shannon Wahnee and states that no member of Wook-Kah-Nah's family was present at the time she told the scrivener of the will how she wanted her property to be devised.

The petition for rehearing also includes the affidavit of George Coosewoon, an old acquaintance of Wook-Kah-Nah, which contains conclusions and statements of fact that have no probative value in determining the validity of decedent's will of February 20, 1954.

¹ *Bodine et al. v. Bodine*, 241 Ky. 706, 44 S. W. 2d 840 (1931); *Forehand v. Sawyer*, 147 Va. 105, 136 S. E. 683 (1927); *Garrison v. Garrison*, 15 N. J. Eq. 266 (1858); cited 79 A. L. R. 401; *Loomis v. Campbell*, 333 Ill. App. 617, 78 N. E. 2d 143 (1948); *Cecala's Estate*, 92 Calif. A. 2d 865, 208 P. 2d 436 (1949).

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It is contended by the appellants that approximately \$250,000 of the funds of Wook-Kah-Nah were wasted by Jane Asenap and Wilfred Tabbytite, the proponents and principal devisees of the will, and that said proponents are indebted to the estate for such funds wasted, upon which an accounting should be required by the Examiner and such funds made a part of the estate before an order of distribution was issued. We cannot agree with this contention. It has no place in this proceeding. Subsequent to June 27, 1951, and before a guardian was appointed to handle the affairs of the decedent, she was entitled to withdraw any and all funds in her individual Indian money account under the provisions of 25 CFR 104.3 (which became effective June 27, 1951). These funds when withdrawn were no longer subject to the Department's jurisdiction and became nontrust property of Wook-Kah-Nah to do with as she pleased. Any action seeking an accounting of such unrestricted funds or seeking to establish a right thereto would be cognizable in the courts. Failure to resort to the courts would not alter the unrestricted character of the property, nor would it confer upon the Examiner of Inheritance any jurisdiction over the subject.²

Appellants rely upon evidence adduced at the hearing to conclude that Wook-Kah-Nah had been blind, incompetent, and totally unable to understand the object of her bounty, the value of money, or the extent of her property since prior to the year of 1941; and that she was legally declared to be mentally incompetent on September 21, 1953, in the county court of Cotton County, Oklahoma, a guardian having been appointed, and she remained under the guardianship until her death. The greater weight of the evidence appears to show that although aged and blind, the decedent was well aware of the objects of her bounty, that she knew the extent of her properties and the comparative values thereof. It appears that she did not comprehend the full merchantable value of her properties except that some had considerable value. Several of the appellants in their testimony stated that the decedent knew what she was doing, that she was alert, that she knew all of her children but was deficient only in her ability to appreciate the value of larger sums of money. Mr. Funston Flanagan who was acting as decedent's guardian had considerable opportunity to discern her competency to make a will. He testified that she had a fair understanding of what was going on around her, that she had an idea as to the way she wanted her property to go and her reasons for it, that she knew the results of the disposition of her real and personal property, that she knew the extent of her holdings and property, and that she was able to give the general location of her

² Cf. *Hanson v. Hoffman*, 113 F. 2d 780 (1940).

various lands. She identified her own allotment and, through interpreters, informed the scrivener that she wanted the north half to go to her daughter Jane and the south half to her son Wilfred. It was the scrivener's opinion that she knew that her allotment was valuable. Dr. Henry G. Smith, who had been attending Wook-Kah-Nah for a number of years up to the time of her death, testified as to the physical and mental condition of Wook-Kah-Nah. He testified that in his opinion she was alert and, as of February 1954, she had the capacity of knowing what she was doing, the results of her actions, and had the mental capacity to execute a will. The attesting witnesses who spoke and understood the Comanche language, both testified that the decedent, on February 20, 1954, was alert, having the mental capacity to make a will, and that she had full and complete knowledge of the contents and effect of her will. Other facts and circumstances, as reflected by the evidence, are that Jane and Wilfred, who receive the major portion of the decedent's estate under the will, are her youngest children, for whom she had shown a definite preference. Jane and Wilfred did not share in the valuable estates of the decedent's prior deceased husband, or her prior deceased son, while the other four children received a share in each of those estates, both of which contained oil producing lands. The decedent also excluded her daughter Flora (who was living at the time of execution of the will, but who died on June 24, 1954) from participating in her estate "for the reason that she has considerable money and property" (oil producing lands constituted the bulk of her estate). Each of the other four children participated in a division of the estate by decedent's will, either by devises of land or the general devise of all of her cash on hand at the time of her death, which was given to all of her children, excluding Flora, in equal shares. The disposition of her estate made by the testatrix appears to be a natural and logical distribution with an apparent appreciation of the values of her property and particularly of her own oil producing allotment.

The appellants have emphasized that since the county court declared Wook-Kah-Nah mentally incompetent on September 21, 1953, and a guardian was appointed, which guardianship continued until her death, the will of Wook-Kah-Nah executed on February 20, 1954, was made during the period of incompetency. It was stated by the guardian that he did not manage the decedent's properties but only carried out the division of money received from her Indian money account, as had been agreed upon by the decedent and was approved by the Area Director. It has been well established by the courts that an adjudication of a testator's mental incompetency to manage his property is to be considered in the determination of

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his testamentary capacity, but such evidence is not conclusive proof thereof.³

The protestants endeavored to show by the evidence that the testatrix lacked understanding, did not know the value of larger sums of money and failed to comprehend what was taking place around her. In commenting on the test for determining testamentary capacity when the testator is a person shown to have limited knowledge of the laws of the State on the general subject, the Supreme Court of Oklahoma, in the case of *Jones v. Denton*, 135 P. 2d 53 (Okla. 1942) said:

However this is a subject that is not without previous consideration by the courts of this State. *In re Blackfeather's Estate*, 54 Okla. 1, 153 P. 839 (1915); *In re Nitey's Estate*, 175 Okla. 389, 53 P. 2d 215 (1935); * * * *In re Wah-kon-tah-he-um-pah's Estate*, 108 Okla. 1, 232 P. 46 (1924); and other cases under 84 O. S. 1941 sec. 41 and notes. These several cases include wills made by Indians who in their lifetime had not wholly dropped the mode of life of their fathers, and had not adopted to any appreciable degree the white man's way of life, and yet were held to possess testamentary capacity. Testamentary capacity has been described by this court in *re Nitey's Estate*, *supra*, as being a state of mental capacity to understand in a general way the nature of the business then ensuing, to be able to bear in mind in a general way the nature and situation of the property, to remember the objects of her bounty, and to plan or understand the scheme of distribution.

It is apparent from the record that the testatrix, Wook-Kah-Nah, knew each of her children and was aware of each one's financial status; she knew in a general way all of her properties and which were of greater value; she knew that she was receiving large royalty payments from the oil produced from her own allotment and she had a definite plan for the distribution of her estate in a manner which she believed would best meet the needs of her children and satisfy her own desires. It is evident that the testatrix demonstrated a sufficient capacity to satisfy the requirements for the validity of her will made on February 20, 1954.

The charge that undue influence was exercised upon Wook-Kah-Nah at the time of making her will of February 20, 1954, by Jane Asenap, one of the principal beneficiaries thereunder, is not supported by the evidence. There appears to be no doubt that Jane Asenap and her brother Wilfred Tabbytite, were favored by the decedent. It also appears that the decedent, although alternately living with several of her children, did for longer periods of time make her home with her daughters, Jane Asenap or Bessie Karty. By her generosity toward her children, in the way of gifts of land

³ *In re Wheeling's Estate*, 198 Okla. 81, 175 P. 2d 317 (1946); *In re Shipman's Estate*, 184 Okla. 56, 85 P. 2d 317 (1938); *In re Nitey's Estate*, 175 Okla. 389, 53 P. 2d 215 (1935).

or of money, she consistently gave to Jane and Wilfred larger shares, and after the appointment of her guardian she provided in the budget of distribution of her funds for larger amounts to be given to these two favored children. The record fails to show any instance or any act on the part of any of the children to influence the decedent in the making of her will. The testimony adduced at the hearing shows that no member of the decedent's family was present at the making or the execution of her will on February 20, 1954. It appears, however, that one of the appellants, Bessie Karty, on that day brought her mother to the office of Funston Flanagan, who prepared the will. Also, that at the time of making her will the decedent was making her home with Bessie Karty.

Appellants contend that most all of the large sum of money received from the Indian agency, purportedly for Wook-Kah-Nah, from July 1, 1951 to September 1953, was wasted by Jane and Wilfred, being a fact which was not considered or investigated by the Examiner. They further contend that such facts are conclusive proof of the mental incapacity of Wook-Kah-Nah and of the influence exerted upon her by Jane and Wilfred. It appears from the record that Wook-Kah-Nah gave money to all of her children or purchased property for them from the funds so received with the possible exception of Flora Taunah. From the testimony of the several children when asked questions in reference to the gifts of money or property by Wook-Kah-Nah to the children, each of their answers were to the effect that Wook-Kah-Nah knew what she was doing. No indication appears in the record that the gifts made by the decedent were a result of her mental incapacity. The gifts made by Wook-Kah-Nah to her children appear to be a natural showing of affection for them. She was greatly advanced in age, almost blind, with few personal needs for her own comfort and had little opportunity or ability to participate in things for her own recreation or enjoyment. She suddenly became the recipient of large sums of money, for which only a small part could be used to satisfy her personal needs, but did provide for her a feeling of security. Like any normal parent, she was able to find enjoyment and satisfaction by sharing her good fortune with her loved ones. Under the circumstances, this appears to be a natural thing for her to do and not the result of any mental deficiency or undue influence.

From the statements made in their testimony at the hearing the appellants had no objection to the will of the testatrix insofar as it divided the land, but they believed that all of the children should share equally in the oil royalties derived from the land.

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The notice of appeal recites that the Department of the Interior paid to the Federal Government in excess of \$187,000 in income taxes, and to the Oklahoma Tax Commission approximately \$6,000 on income that was decreed by the Supreme Court of the United States not to be taxable.⁴ The Bureau of Indian Affairs has caused claims to be filed for the recovery of these funds. It is contended that it will be necessary to determine whether said funds are under the jurisdiction of the Examiner of Inheritance or under the jurisdiction of the administrator with the will annexed, appointed in the county court of Cotton County, Oklahoma, before it may be determined if the same is omitted property. It appears that any refunds recovered on these taxes previously paid out of the decedent's trust or restricted account would be returned to such account, and would be subject to the probate jurisdiction of the Examiner of Inheritance. When these refunds are received and placed in decedent's account, the Examiner will then issue an order to modify the original decision of August 17, 1956, to include such funds and order the distribution to those persons entitled thereto, in accordance with the regulations pertaining to omitted property, 25 CFR 15.31. The original order of August 17, 1956, need not be stayed, reconsidered, or amended pending a refund of these taxes.

Upon the record of the evidence adduced at the hearing and upon the applicable law as stated by the courts, we concur in the determination of the Examiner of Inheritance that the last will and testament of Wook-Kah-Nah, dated February 20, 1954, represents the testatrix's true wishes respecting the disposition of her property, her free and voluntary act without being subjected to any undue influence, that the will was properly made and executed, and that the testatrix was possessed with sufficient mental capacity so as to be of sound and disposing mind and memory.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order 2509, as revised; 17 F. R. 7243), the order of the Examiner of Inheritance denying the petition for rehearing is affirmed and the appeal is dismissed.

The Anadarko area field representative is directed to distribute the decedent's estate in accordance with the Examiner's order, dated August 17, 1956.

EDMUND T. FRITZ,
Acting Solicitor.

⁴ *Squire v. Capoeman*, 351 U. S. 1 (1956).

G. E. KADANE & SONS

A-27671

*Decided October 30, 1958***Mineral Leasing Act: Lands Subject to—Oil and Gas Leases: Lands Subject to**

Where the records of the Department show that public lands have been set aside as a permanent addition to an Indian reservation, those lands are not available for oil and gas leasing under the provisions of the Mineral Leasing Act.

Withdrawals and Reservations: Generally

Where, by act of Congress, all vacant, unreserved, and undisposed of public lands within a described area are permanently withdrawn from all forms of entry or disposal under the public land laws and where the lands are later identified by a survey accepted by the Department, the lands covered by the survey are withdrawn from disposition and applications filed therefor must be rejected, regardless of whether the survey was accurate or inaccurate.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by G. E. Kadane & Sons, a partnership, from a decision of the Director, Bureau of Land Management, dated February 3, 1958, wherein the Director affirmed the action of the manager of the land office at Salt Lake City, Utah, in rejecting three offers, filed by the appellant on January 28, 1957, for noncompetitive oil and gas leases under the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. V, sec. 226). The offers were rejected by the manager because the lands embraced therein are within the Navajo Indian Reservation as enlarged by the act of March 1, 1933 (47 Stat. 1418).

In its appeal to the Director, the appellant contended that the survey made of the area added to the Navajo Indian Reservation by the act of March 1, 1933, is erroneous and that the plat of the official survey thereof includes within the boundaries of the addition lands which the Congress had not intended should be added to the reservation. The appellant contended that its offers embrace lands which are outside of the reservation and that those lands are public lands subject to the operation of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 181 *et seq.*).

The Director found that the lands sought are shown on the official plat of survey, accepted in 1947, as being within the reservation. He held that acceptance of the plat segregated the lands from the public domain; that while that survey stands the lands shown thereon as being within the addition to the Navajo Indian Reservation are not available for oil and gas leasing under the terms of the Mineral

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Leasing Act; and that therefore it was correct to reject the appellant's offers. He found further that certain of the lands covered by the offers had been patented to individual Indian allottees without reservation of the oil and gas deposits therein and that portions of the lands applied for were within the known geologic structure of a producing oil and gas field prior to the date on which the offers were filed.

In this appeal to the Secretary, the appellant concedes that its offers should have been rejected as to so much of the lands as are included in patented individual Indian allotments and as to those lands which were, when the offers were filed, within the known geologic structure of a producing oil and gas field. It contends, however, that the Director erred in not ruling on the accuracy of the survey and in not ruling specifically on the question whether the lands applied for are actually within the boundaries of the lands set aside as an addition to the Navajo Indian Reservation by the act of March 1, 1933.

The Commissioner of Indian Affairs, the Navajo Tribe, and The Texas Company, which company holds oil and gas leases on portions of the lands included in two of the offers, issued by the tribal council with the approval of the Secretary of the Interior (or his delegate) under the authority of the act of May 11, 1938 (25 U. S. C., 1952 ed., secs. 396a-396f), have filed documents in support of the Director's decision and each requests that, in the event the correctness of the survey is to be inquired into, he or it be given an opportunity to be heard in the matter.

However, it is deemed to be unnecessary for the purpose of deciding the Kadane appeal to inquire into the correctness of the survey of the lands added to the Navajo Indian Reservation by the act of March 1, 1933.

That act—"An Act To permanently set aside certain lands in Utah as an addition to the Navajo Indian Reservation, and for other purposes"—provides, in section 1 thereof:

That all vacant, unreserved, and undisposed of public lands within the areas in the southern part of the State of Utah, bounded as follows: * * * also beginning at a point where the west rim of Montezuma Creek or wash intersects the north boundary line of the Navajo Indian Reservation in Utah; thence northerly along the western rim of said creek or wash to a point where it intersects * * * to the point of beginning be, and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: * * *.

Thus, all vacant, unreserved, and undisposed of lands within the areas specified in the act were permanently withdrawn from all forms:

of disposal, including leasing under the Mineral Leasing Act, and set aside for the benefit of Indians.

Implicit in the act is the requirement that the lands added to the reservation be identified. They were so identified by the survey accepted in 1947.

The lands for which the appellant applied are shown by the official records of the Department as withdrawn lands, being part of the area described in the above-quoted portion of section 1 of the act. They have been treated as lands set apart from the public domain and at least some of them have been leased for oil and gas purposes with the approval of the Secretary of the Interior. Tacit in his approval of those leases is a recognition that the leased lands were added to the reservation by the act of March 1, 1933, and that the survey made to identify the lands so added is correct.

While that survey stands, the lands are not available for leasing under the terms of the Mineral Leasing Act. Whether the survey be correct or incorrect, the acceptance thereof had the effect of withdrawing the lands covered thereby from the operation of the Mineral Leasing Act. *Ira J. Newton*, 36 L. D. 271 (1908); cf. *Stoneroad v. Stoneroad*, 158 U. S. 240 (1895), and *French v. United States*, 49 Ct. Cls. 337 (1914).

The Director of the Bureau of Land Management was not required, merely because an application was filed to lease lands shown on the official records of the Department to be unavailable for such leasing, to inquire into the accuracy of the survey or to determine whether lands shown by that survey as having been added to the reservation were actually intended by the Congress to be so added.

Having determined that, according to the records of the Department, the lands applied for were not available for leasing under the Mineral Leasing Act when the lease offers were filed, it was incumbent on him to reject the offers. *Noel Teuscher*, 62 I. D. 210 (1955); *D. Miller*, 60 I. D. 161 (1948).

Accordingly, it must be held that there is no merit in the appeal.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

*October 30, 1958***PAUL H. DUDLEY****A-27672***Decided October 30, 1958***Rules of Practice: Appeals: Failure to Appeal**

Where a decision of the manager of a land office gives an applicant for an extension of an oil and gas lease 30 days in which to file a bond or to take an appeal, failing in which the application for extension will be denied and the lease deemed to have expired, and the applicant does neither within the time allowed, he loses his right to have the manager's decision reviewed on the merits.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Paul H. Dudley has appealed from a letter of the Director of the Bureau of Land Management dated February 19, 1958, stating that he would not consider Mr. Dudley's appeal from the action of the manager of the land office at Denver, Colorado, refusing to extend a noncompetitive oil and gas lease Colorado 03235, closing the case, and so noting the land office records. The Director declined to consider Dudley's case as an appeal on the ground that it was not timely filed and stated that the filing fee would be returned upon request to the land office. On March 5, 1958, acting pursuant to the Director's announcement, the manager issued his decision officially dismissing the appeal and declaring the lease terminated as of October 31, 1956.

The record shows that Dudley held two noncompetitive oil and gas leases, Colorado 03235 and Colorado 03236, both effective as of November 1, 1951. Lease Colorado 03235 includes 2,427.32 acres, part of which is patented land in which the United States has reserved the minerals. Lease Colorado 03236 includes 160 acres all of which are patented land subject to reservation of minerals. Dudley furnished a bond in the amount of \$1,000 to protect the interests of the owners of the surface rights in the patented land included in each lease. Both bonds included a declaration that the principal had been granted an exclusive right to drill for, extract, remove and dispose of all oil and gas deposits in or under all of the land covered by the particular lease referred to in each case.

On September 24, 1956, the land office received Dudley's application for extension of lease Colorado 03235 and on October 22, 1956, his application for extension of lease Colorado 03236, accompanied in each case by a check in the amount of the rental for the sixth year. By identical form decisions dated November 21 and November 23, 1956, the manager notified Mr. Dudley:

Before the lease can be extended the lessee is required to file consent of the surety to the extension of the lease and its agreement to remain bound under

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its present bond for the term of the extension, or to file a new bond in like sum, using the enclosed form.

Thirty days from receipt hereof are allowed to comply with the requirements of this decision, or to appeal to the Director, Bureau of Land Management, failing in which the application for extension of the lease will be denied and the lease will be held to have expired at the expiration of its primary term. Any appeal must be filed in this office.

Typed at the end of the decision relating to Colorado 03235 was the following: "NOTE: SEE ATTACHMENT RE APPEAL INFORMATION." A notation to the same effect was typed at the end of the decision pertaining to Colorado 03236. The decisions were served on Dudley on December 3, 1956.

The appellant alleges that on December 4, 1956, he wrote to the manager of the Long Beach Insurance Agency, Charles H. Holmes, asking him to write the Hartford Accident & Indemnity Company in Los Angeles, requesting that company to forward consent to extension of both oil and gas leases and agreement to continue the bonds, sending such notice directly to the land office in Denver. This letter stated that the consent must be in the land office by December 21, 1956, or the leases would be canceled. On the same day, Mrs. Dudley telephoned to Holmes and told him the letter was coming and warned him about the deadline of December 21, 1956. On December 13, 1956, Dudley had occasion to write Holmes about other leases and again referred to Colorado 03235 and Colorado 03236 and stated that the consents discussed in that letter should be handled in the same fashion as the first two. Later Dudley visited the Long Beach Insurance Agency office and saw a carbon copy of Holmes' letter of December 4, 1956, to Hartford asking for the filing of the consents with the land office in Denver by December 21, 1956. Holmes inquired and learned at that time that the letter had been lost in the mail between Long Beach and Los Angeles or misplaced in the Hartford office so that the request for consent had to be initiated anew in the latter part of January. Dudley gave the land office a full explanation in his letter dated January 25, 1957. The Hartford Company sent the consent to the land office on January 28, 1957, requesting that it be accepted because not delayed through any fault of Dudley. On February 1, 1957, the manager wrote to Dudley, stating that the cases had been closed on January 17, 1957, because of his failure to renew the bond. He added:

I do not believe that this office is authorized to reinstate the leases in the circumstances. You may, if you so desire, file new offers for the lands involved subject of course to intervening applications.

On February 16, 1957, Dudley wrote the manager stating that he would like to appeal as to Colorado 03235, asking that "extension be granted on the part of the lease not covered by the bond." He pointed out that the rental for the sixth year was paid before ex-

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piration of the primary term of the lease and that the bond applied to only 200 acres of the leased land. He concluded that "it would seem only reasonable that failure to consent to extension and to remain bound would apply to this acreage alone, and that dispossessing me of 2,227.32 acres amounts to confiscation of property without due process. I have your check refunding rentals but have not cashed it, to avoid closing the case." The manager answered on February 19, telling Dudley that if he wished to appeal he must forward the filing fee and any additional statement desired to the land office within 30 days from service of that letter upon him. Dudley paid the filing fee on February 25, but did not furnish any further statement of the reason for his appeal. The manager acknowledged receipt of the fee and forwarded the file to the Director on February 27, 1957.

While the matter was pending in the Director's office, Mrs. Dudley sent the rental for the seventh year and informed the land office that Mr. Dudley had not cashed the check for the sixth year's rental, which had been returned to him, in order to keep the appeal alive.

On February 19, 1958, the Director's office sent Dudley a letter informing him that the manager was not authorized to regard his letters as an appeal from the manager's decision of November 21, 1956, since they were not filed within the 30-day period allowed for an appeal. The letter then stated that no reason was apparent for a change in the decisions since the Department has always required a bond covering all the lands in a lease although only a portion of such lands is subject to reservation of minerals, and concluded with the statements that the lands previously included in the terminated leases had been placed under new leases, Colorado 016555 and 016556, and that the appeal fees could be returned on request to the land office. On March 4, 1958, the manager dismissed the appeal from the decision of November 21, 1956, and on March 5, 1958, dismissed the appeal from the decision of November 23, 1956, and held that both leases terminated at the expiration of their primary term on October 31, 1956.

The record shows that Dorothy Chorney was issued an oil and gas lease, Colorado 016555, covering all the lands included in Mr. Dudley's Colorado 03235, effective March 1, 1957. The bond furnished by her covers only the 200 acres designated as patented land subject to mineral reservation. Dorothy Chorney was issued an oil and gas lease also effective on March 1, 1957, on all of the lands included in Dudley's Colorado 03236. The bond furnished by her covers all of the land included in this lease all of which is designated as patented land subject to reservation of minerals.

In the brief filed in support of his appeal to the Secretary as to

lease Colorado 03235 only, Dudley contends that the manager's decision of November 21, 1956, was not appealable since it was not a final order, was not clear as to the requirement for appeal from the request for bond or from the threatened future action for failure to furnish bond, and did not result in any adverse action of which Mr. Dudley was notified. He also contends that the lease should have been extended as to the lands not subject to mineral reservation since (1) this is necessary to preserve the statutory preference right of the first qualified lease applicant; (2) the existing regulations do not indicate that an offer to lease or an application for extension of a lease will be rejected for failure to furnish bond for lands subject to mineral reservation which comprise only a portion of the designated lands; and (3) there are no decisions of the Department holding that failure to furnish a bond required on a portion of the lands designated therein will require rejection of an offer to lease or application for extension of a lease as to all lands.

The first issue which must be met is whether the manager's decision of November 21, 1956, was an action from which the appellant was required to appeal within the time allowed by the pertinent regulation (43 CFR, 1954 Rev., 221.2 (Supp.)), in order to protect his right to have the case reviewed on its merits. The manager's decision plainly informed the appellant of his choice—either (1) file a bond, or (2) appeal from the requirement that he file a bond. It also warned him that, if he failed to do either, his request for extension would be denied and his lease deemed to have expired at the expiration of its primary term. As to the requirement that a bond be filed, the manager's decision was clearly final. It imposed a requirement upon the appellant and set a limit to the time in which he must comply. If the appellant objected to filing a bond, he was obliged to file a timely appeal, or lose his right to object. He, in effect, contends that the manager should have issued another decision notifying him that his request for an extension had been rejected from which he could have taken an appeal. This procedure would give a lessee two periods in which to appeal from the one requirement that he file a bond in 30 days. I fail to see any right to have two periods for filing appeals.

The form of decision used by the manager is common and applicants who fail to comply with the requirement on appeals lose whatever rights they had. *John R. Moran et al.*, A-27463 (October 21, 1957); *D. Miller*, A-27563 (April 29, 1958).

The appellant was not confused by the manager's decision. He understood what was required of him and sought to comply. Unfortunately, those to whom he delegated the task of submitting the bond appear to have failed him. However, the responsibility was his and the failure of his agents to follow his instructions does not

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relieve him of the consequences of their neglect. *Albert H. Dobry, George H. Borovay*, 64 I. D. 116, 122 (1957).

The appellant urges that the manager's decision was ambiguous as to the portion informing him that his request for an extension would be denied in its entirety for failure to file a bond and that as to this portion his right to appeal did not terminate until 30 days after final action, that is, denial of his request for extension had been taken. However, if the appellant had had any objections to filing a bond for all or any part of his lease, he could have voiced his objection by an appeal within the 30 days allowed him. Not having objected to the requirement that he file a bond, he is bound by that requirement. It follows that, even if he were to be allowed another appeal period from the closing of the case, there would be no grounds on which he could base his appeal. I fail to see how Dudley can be permitted to raise any question as to the necessity for filing a bond unless he is given two appeal periods. The contention that the first appeal period would deal merely with the requirement that a bond be filed and the second with the consequences of failure to file a bond appears to me to be insubstantial. There was only one requirement imposed on Dudley, that he file a bond, and one alternative offered him, that he appeal. These were incorporated in the manager's decision which is the substantive decision determining Dudley's rights. By failing to file a timely appeal from this requirement, Dudley has lost all right to have the rejection of his request for an extension reviewed on the merits. It is unnecessary to consider the other issues raised by the appellant.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the action of the Director of the Bureau of Land Management refusing to consider Dudley's appeal is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

UNITED STATES

v.

BUNNO E. MATSEN

A-27712

Decided November 10, 1958

Words and Phrases

Service. "Service" on a person or on his authorized representative means the delivery or communication of a notice or other paper in a proceeding in such a manner as legally to charge the party who is served with notice of receiving it.

Rules of Practice: Appeals: Generally

By departmental regulation (43 CFR, 1957 Supp., 221.95 (d)), where a party is represented by an attorney, service of any document relating to the proceeding upon such attorney will be deemed to be service on the party he represents, and service of a copy of a decision on an attorney of record is notice of receipt of the decision to the party he represents.

Rules of Practice: Appeals: Timely Filing

An appeal to the Director of the Bureau of Land Management from a hearing examiner's decision is properly denied where the notice of appeal was not filed within the time required by the Department's rules of practice.

Rules of Practice: Appeals: Generally

On an appeal to the Secretary from a decision denying an appeal from an examiner's decision which held 12 mining claims and a mill site null and void, a requirement that a \$5 filing fee for each separate mining claim and the mill site accompany the notice of appeal was proper.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Bunno E. Matsen has taken an appeal to the Secretary of the Interior from a decision of February 11, 1958, by the Director of the Bureau of Land Management denying an appeal which Matsen filed from a decision by a hearing examiner involving the appellant's 12 mining claims and a mill site situated in Jefferson County, Washington.

A hearing was held in Aberdeen, Washington, on September 5, 1956, on charges brought by the United States that the land covered by the appellant's mining claims is nonmineral in character and that a valid discovery had not been made on any of the claims. Thereafter, in a decision of November 30, 1956, on the contest, the hearing examiner declared the mining claims and the mill site null and void. A copy of the decision was served on Arthur R. Paulsen, attorney of record for the contestee, on December 7, 1956.

In a notice received on June 10, 1957, Matsen appealed from the examiner's decision to the Director. By decision of June 12, 1957, the examiner dismissed Matsen's appeal because it was not timely filed. The only question in dispute on the instant appeal is the correctness of the decisions denying Matsen's appeal to the Director.

At all times pertinent in this case, the rules of practice governing appeals to the Director required that notice of such an appeal be filed within 30 days from receipt of the decision from which the appeal was taken.¹ Another rule of practice provides that where a party is

¹ 43 CFR, 1957 Supp., 221.2 provided that:

"A person who wishes to appeal to the Director must file in the office of the officer who made the decision a notice that he wishes to appeal. Except where an agency of the Federal Government or of a State or territorial government or political subdivision thereof or a municipal corporation is the appellant, the notice of appeal must be accompanied by a filing fee of \$5 for each separate application, claim, entry, permit, lease, protest, or similar filing or interest on which the appellant is seeking favorable action. The consolidation of appeals will not relieve each appellant of paying the same filing fee that he would have to pay if he took his appeal separately. The notice of appeal must give the serial number

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represented by an attorney, service of a document on the attorney will be deemed to be service on the party he represents.² The examiner's decision of June 12, 1957, held that since Matsen had not filed a notice of appeal from the decision of November 30, 1956, within 30 days after a copy of the decision was served on his attorney, the appeal was not timely filed. The decision did not allow the right of appeal, but nevertheless, in a letter to the Director, filed on December 16, 1957, Matsen enclosed a memorandum on appeal from the examiner's decision of June 12, 1957, and requested that the Director render a written decision thereon.

In an affidavit of July 15, 1957, submitted in support of the appeal to the Director, Matsen acknowledged receipt on June 5, 1957, of the examiner's decision of November 30, 1956, through Matsen's former attorney, Arthur R. Paulsen. Matsen stated in the affidavit that he had no knowledge of any decision having been rendered before May 15, 1957; that notice of appeal to the Director from the decision of November 30, 1956, was filed within 30 days of the date of receipt of the decision by the person taking the appeal.³

On appeal to the Director, it was contended, *inter alia*, that the provision in section 221.2 requiring that appeals be filed within 30 days after the person taking the appeal received the decision he is appealing from is a special provision and that, therefore, it is not limited, modified, or controlled by section 221.95 (d) regarding the effect of service of any document relating to a proceeding on an attorney representing a party in a case, as the latter provision is a general provision. The contention is based on the rule of statutory con-

or other identification of the case and must be received in the office where it is required to be filed *within 30 days after the person taking the appeal received the decision he is appealing from*. No extension of time will be granted for filing this notice. A notice of appeal which is filed late or which is not accompanied by the required filing fee will not be considered and the case will be closed by the officer from whose decision the appeal is taken. The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make." [Italics added.]

This regulation was amended effective March 22, 1958 (23 F. R. 1929), without significant difference so far as the issue in this appeal is concerned.

² 43 CFR, 1957 Supp., 221.95 (d) provides:

"In all cases where a party is represented by an attorney, such attorney will be recognized as fully controlling the same on behalf of his client, and service of any document relating to the proceeding upon such attorney will be deemed to be service on the party he represents. Where a party is represented by more than one attorney, service upon one of the attorneys shall be sufficient."

³ By way of explanation, the appellant suggests that the former attorney of record lost interest in the case or neglected to notify the appellant of the examiner's decision. However, there is evidence in the record which conflicts with the appellant's statement that he had no knowledge of any decision having been rendered before May 15, 1957.

The hearing examiner received a copy of a letter of May 17, 1957, to Matsen from his former attorney, Arthur R. Paulsen, regarding the decision of November 30, 1956, which states in part that:

"* * * I mailed notice to you last December of the decision, the appeal time from the order was thirty days, and I, being without any further evidence in the case upon which to base an appeal, notified you that I would not proceed with an appeal in the absence of additional evidence which would justify same."

struction that where there is, in the same statute, a provision dealing with a subject in general terms and another provision dealing with a part of the same subject in more detailed terms, the two should be harmonized if possible but if there is any conflict the latter will prevail (J. G. Sutherland, *Statutes and Statutory Construction* (3d ed., Horack, Vol. II, secs. 5204, 5205)). The Director's decision pointed out that this rule of construction is operative only where both provisions independently cover the same matter and is not applicable to a situation where, as here, the general provision is merely auxiliary to and supplemental of one or more special provisions.

On this appeal it is contended that the reference in section 221.2 to "the person taking the appeal" clearly means the contestee, not his attorney; that no rule provides that an appeal must be filed within 30 days of service of a decision upon an attorney of record; that the time for appeal starts only when the decision has been "received" by the person taking the appeal; and that an appellant should not be deprived of the right of appeal where he has complied with section 221.2. These contentions are based on the untenable premise that there is a substantial difference between service of notice of a decision on an attorney of record representing a party in interest and receipt of a copy of the decision by that party.

Notice of decisions and of other matters relating to proceedings before the Department is ordinarily given by serving (bringing to notice or delivering)⁴ a copy thereof on the party in interest or on his authorized representative. Service on a person or on his authorized representative means the delivery or communication of a notice, pleading, or other paper in a proceeding in such a manner as legally *to charge the party who is served with notice of receiving it*,⁵ and "service" at law has been defined as the act of bringing to notice, either actually or constructively in such a manner as is prescribed by law.⁶ Thus the phrases "service on" and "notice to" a party or his authorized representative are sometimes used interchangeably.

The regulation corresponding to section 221.95 (d) regarding service of notices on attorneys, which was in effect for many years before the adoption of the present rules of practice, was numbered 221.80 (a) and provided:

In all cases where any party is represented by attorney, such attorney will be recognized as fully controlling the same on behalf of his client, and service of any notice or other paper relating to such proceedings upon such attorney will be deemed notice to the party in interest. (43 CFR, 1954 Rev., 221.80 (a).)

⁴ 43 CFR, 1957 Supp., 221.95 (a) provides:

"Wherever the regulations in this part require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau."

⁵ *Sway v. Whiting*, 96 N. E. 2d 609, 611 (Ohio 1950); *Neff v. City of Indianapolis*, 176 N. E. 232, 233 (Ind. 1931); Sec. 42 *American Jurisprudence*, "Process" sec. 23 *et seq.*

⁶ *Carnes v. Pittman*, 74 S. E. 2d 852, 854 (Ga. 1953).

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In a decision involving the regulation (formerly 43 CFR, 1949 ed., 221.85 (a)), the Department stated that where a party is represented by an attorney, service of notice relating to the proceedings upon the attorney is considered to be notice to the party in interest (*E. E. Larsen*, A-25888 (Aug. 4, 1950)).

Earlier rules of practice provided that all notices will be served upon attorneys of record and that notice to an attorney representing a party in a case will be deemed notice to the party (see rules 105, 106, 4 L. D. 37, 48 (1885); 23 L. D. 593, 606 (1896); 29 L. D. 725, 740, (1899); *Duncan v. Rand*, 19 L. D. 354 (1894); *Staples et al. v. St. Paul and Northern Pacific R. R. Co.*, 25 L. D. 294 (1897)). Although the language of these earlier provisions is not identical with the language of section 221.95 (d), it is plain that the latter section, when read with the definition of service in section 221.95 (a), and in view of the fact that "service on" means "notice to" (see footnotes 5 and 6), has the same meaning as the earlier corresponding provisions had. Accordingly, the long-established rule of this Department that service of any notice or other paper relating to a proceeding upon an attorney who represents a party in a case is considered to be notice to the party in interest has not been modified by the slight difference in the language of section 221.95 (d) and the earlier corresponding provisions mentioned above, and the cited departmental decisions are decisive as to the issue raised on this appeal.

Inasmuch as the appellant's attorney of record received a copy of the decision of November 30, 1956, on December 7, 1956, the appellant received notice of the decision on that day as provided by section 221.95 (a) and (d). Since the appeal from the decision of November 30, 1956, was not filed within 30 days from receipt thereof, as required by section 221.2, the Director's decision denying the appeal was correct (see *Charles F. and Charles P. McCuskey*, 63 I. D. 22 (1956)).

The Director required that the appellant pay a filing fee of \$65 in taking this appeal to the Secretary. A filing fee of \$5 had been paid with the notice of appeal and the additional amount required by the Director was paid on behalf of the appellant under protest. 43 CFR 221.32, as amended effective March 22, 1958 (23 F. R. 1930), the regulation governing the filing of this appeal to the Secretary, provides in relevant part that:

* * * a filing fee of \$5 must be paid for *each separate application, claim, entry, permit, lease, protest, or similar filing or interest on which the appellant is seeking favorable action.* The consolidation of appeals will not relieve each appellant of paying the same filing fee that he would have to pay if he took his appeal separately. * * * [Italics added.]

It is contended for the appellant that he filed only one application for hearing upon the charges of the Department of the Interior, that the only claim here involved is the claim of the United States that the

land embraced within the limits of each location is nonmineral in character, and consequently that only a single \$5 filing fee is required on this appeal.

The Department construes the provision regarding the payment of filing fees to mean that if more than one mining claim is involved in an appeal, a filing fee of \$5 must be paid for each separate claim on which the appellant is seeking favorable action. Presumably Matsen is seeking favorable action on each of the 12 mining claims and the mill site which were declared null and void by the examiner's decision of November 30, 1956. Accordingly, the requirement that a filing fee of \$5 be paid for each of the separate claims and the mill site is proper.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

UNITED STATES

v.

LAURA DUVALL AND CLIFFORD F. RUSSELL

A-27717

Decided November 19, 1958

Mining Claims: Discovery

Where the alleged discovery in a mining claim consists only of an indication of tungsten and zirconium which of themselves do not warrant a reasonable man in the further expenditure of time and money with the reasonable prospect of success in an effort to develop a valuable mine, there has been no valid discovery of a valuable mineral deposit within the meaning of the mining laws.

Mining Claims: Discovery

In the absence of a valid discovery within the meaning of the mining laws, the mere hope or expectation based upon a general belief that values increase with depth is not sufficient to validate a mining claim.

Mining Claims: Special Acts

Where the deposits for which a mining claim has been located are a common variety of sand or stone, are of widespread occurrence, and are the country rock of the area, they are materials which the act of July 23, 1955, has removed from the category of valuable mineral deposits locatable under the mining laws and the fact that they, in common with all similar materials, may be of use and value for commercial purposes does not exempt them from the stricture of the statute.

Mining Claims: Mill Sites

A mill site which is not used for mining or milling purposes in connection with a lode claim and which does not contain a quartz mill or reduction works is invalid.

*November 19, 1958***Mining Claims: Mill Sites**

A mill site which is used solely in connection with placer claims is invalid.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Laura Duvall and Clifford F. Russell have appealed to the Secretary of the Interior from a decision dated April 15, 1958, of the Director of the Bureau of Land Management which affirmed a decision by a hearing examiner holding two placer mining claims and a mill site claim to be null and void.

The claims are situated in sec. 31, T. 6 S., R. 5 W., sec. 36, T. 6 S., R. 6 W., and sec. 1, T. 7 S., R. 6 W., S. B. B. M., California, and are within the Cleveland National Forest. Contest proceedings were initiated against the claims on the basis of two complaints by the United States Forest Service, Department of Agriculture,¹ on charges that the placer claims, the Ortega Highway and County Line (Decomposed Quartz Diorite) Placer Claims Nos. 1 and 2, were invalid because the land within the claims is nonmineral in character and no discovery of mineral has been made and that the mill site claim, called the Duvall and Russell mill site claim, is not used in connection with a vein or lode and does not contain a quartz mill or reduction works.

A 2-day hearing was held before a hearing examiner at which the United States was represented by the Office of the Solicitor, Department of Agriculture (43 CFR 205.7), and the contestees by their attorney. Each side presented several witnesses and offered numerous exhibits. In a decision dated April 25, 1957, the hearing examiner found that the deposits of tungsten and zirconium on the claims did not constitute a valuable discovery under the mining laws, that the deposits of decomposed granitic material and massive granitic rock, while marketable, were common varieties of stone or stone and sand and not locatable under the mining laws. He also found that the mill site claim was not being used in connection with a vein or lode, and that it did not contain a quartz mill or reduction works. He therefore held the placer claims and the mill site claim null and void.

Upon appeal, the Director affirmed the hearing examiner's decision and, in addition, reversed the hearing examiner's finding that the deposits of decomposed granitic material and massive granitic rocks were marketable at a profit.

It appears that the placer claims were first located by a group of eight locators, including the contestees, on January 7, 1956, for deposits of decomposed quartz diorite, covering approximately 160 acres each. The original locations were later amended. The mill site claim was located by the contestees on March 15, 1956. Finally,

¹ 43 CFR 205.6.

on October 8, 1956, the contestees located the Los Tres Amigos No. 1 lode claim. The mill site and lode claims apparently overlap or abut each other and both are within the exterior boundaries of placer claim No. 1 (Ex. 18, G).²

In addition to the materials for which the placer claims were originally located the contestees assert that they contain deposits of tungsten and zirconium, so that the claims are alleged to be valuable both for minerals of wide occurrence, the decomposed granitic material, and for relatively rarer minerals, the zirconium and tungsten.

The latter deposits, as valuable mineral deposits in the public lands, are open to exploration and purchase and the lands in which they are found are open to occupation and purchase except as they have otherwise been withdrawn or reserved for other disposition (30 U. S. C., 1952 ed., sec. 22). While the lands remain open and until other rights have attached to them, the discovery of a valuable mineral deposit within the limits of the claim will validate the claim (30 U. S. C., 1952 ed., secs. 23, 35). A valid discovery, it has often been held, is one which would warrant a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a valuable mine. *Castle v. Womble*, 19 L. D. 455 (1894); *Chrisman v. Miller*, 197 U. S. 313 (1905); *United States v. Strauss et al.*, 59 I. D. 129, 137, 138 (1945); *United States v. Everett Foster et al.*, 65 I. D. 1 (1958).

The evidence relating to the values of the tungsten and zirconium in the claims is summarized in the Director's decision and need not be restated. The contestees do not assert that the values indicated by their assays warrant a finding that the deposits tested are of commercial quality. They contend that the values warrant further exploration within the criterion as to what constitutes a discovery of a valuable mineral and that further exploration may lead to the development of more valuable deposits (Tr. 307, 308, 321). The basis for this expectation seems to be the theory expounded by Samuel Duvall, husband of Laura Duvall (Tr. 315), that, in general, richer zones of minerals are found the further down one goes (Tr. 308). He did not offer any other support for his theory and did not apply it in particular to the deposits in question.

A mining engineer, employed by the United States Forest Service, Department of Agriculture, testifying for the contestant, stated that the deposits of zirconium and tungsten were of no significance and that there was no reason whatsoever to expect a concentration of these minerals with an increase in depth (Tr. 328-329).

The most that can be said for the contestees' evidence is that it

² References to Exhibits (Ex.) are to the exhibits submitted by the parties at the hearing and references to the transcript (Tr.) are to the transcript of the hearing.

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expresses a hope or expectation that the deposit will increase in value as the depth increases. These are not enough to validate a mining claim. *East Tintic Consolidated Mining Claim*, 40 L. D. 271 (1911); *United States v. Josephine Lode Mining and Development Company*, A-27090 (May 11, 1955); *United States v. Francis N. Dlouhy et al.*, A-27668 (September 24, 1958).

Moreover, since these claims lie in a national forest, the evidence sustaining the validity of the mineral locations must be clear and unequivocal. *United States v. Black*, 64 I. D. 93, 95 (1957); *United States v. Dawson*, 58 I. D. 670, 679 (1944); cf. *United States v. Langmade and Mistler*, 52 L. D. 700 (1929).

On the basis of the entire record, it must be concluded that there has been no discovery of valuable deposits of zirconium and tungsten within the limits of the placer claims.

The other minerals which the contestees say give validity to the placer claims are a decomposed granitic material, which lies in depth upon the claims, just under the topsoil, and massive granitic rocks. As the Director pointed out, there was a great deal of dispute at the hearing as to whether the decomposed granitic material was granodiorite or quartz diorite, which are distinguished from each other on the basis of the amount of orthoclase, a feldspar, they contain. Whatever the proper technical nomenclature of the material is, to validate the mining claims it must be a mineral locatable under the mining laws. Section 3 of the act of July 23, 1955. (30 U. S. C., 1952 ed., Supp. V, sec. 611), amended the mining laws by removing certain materials from the category of valuable mineral deposits. It provides:

A deposit of common varieties of sand, stone, gravel, pumice, pumicité, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however*, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more.

Since the placer claims in question were located after the date of the act, if the mineral on which the validity of the location depends is one of those which cannot constitute a valuable mineral deposit, the claims are invalid.

The contestant's evidence was entirely to the effect that the granodiorite (or quartz diorite) was a common variety of stone, that it constituted the country rock of a widespread area, and that the granitic rock was also part of the country rock of the area. The locators' evidence to the contrary consisted of a map (Ex. H) pre-

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duction works on the mill site, it cannot be valid under the second clause. Accordingly, I conclude that the mill site does not meet the requirements of either portion of the statute.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management holding the placer mining claims and the mill site claim null and void is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF LARSEN-MEYER CONSTRUCTION CO.

IBCA-85 *Decided November 24, 1958*

Contracts: Appeals—Contracts: Delays of Contractor—Contracts: Unforeseeable Causes

A contractor who seeks an extension of time under a standard form construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract, that it delayed the orderly progress or ultimate completion of the contract work as a whole, and that it did so for a given period of time.

Contracts: Unforeseeable Causes

The contingency that some event of local public interest will cause a temporary increase in traffic on a road under improvement is one so apt to happen that it would normally be allowed for in a road contractor's pre-bid traffic estimate, and, therefore, such an occurrence does not constitute an unforeseeable cause of delay even though the particular event that causes the traffic increase is one which, although annual, has neither a fixed date nor a fixed site.

Contracts: Unforeseeable Causes

The unusualness of the weather on a stormy day cannot be determined merely by measuring the severity of the weather on that particular day against the average weather for the same day in prior years, but must be determined on a basis that takes account of the frequency with which days of like or greater severity occurred during the same months or seasons of prior years.

Contracts: Contracting Officer—Contracts: Suspension and Termination

Under a contract which empowers the contracting officer to suspend the work when the weather is unsuitable, or conditions are unfavorable for its suitable prosecution, the action of the contracting officer in fixing the date on which a suspension is to begin or end does not preclude the retroactive allowance of extensions of time for a period immediately preceding or following the date so fixed, if during such period no real progress on the contract work was achieved by reason of weather conditions that clearly were unsuitable or unfavorable.

Contracts: Interpretation—Contracts: Specifications

A specification provision that payment for material excavated from a borrow pit shall be exclusive of overburden stripped from the pit and that the usable material to be paid for shall be "measured in original position" necessitates a determination of the elevation of the underside of the overburden in its original position before stripping, and is not complied with by a measurement which reflects the size of the whole pit upon completion of all excavation less the volume of the overburden in its position at that time, irrespective of whether or not in such measurement an allowance is made for swelling of the stripped overburden.

Contracts: Payments—Contracts: Performance

Under a unit-price contract for the excavation of borrow material where the Government fails to comply with the measurement provisions of the contract, and where compliance subsequently becomes impossible, payment for the excavated material is to be made on that basis which is most consistent with the provisions of the contract and the available data of a reliable nature as to the quantities excavated.

BOARD OF CONTRACT APPEALS

Larsen-Meyer Construction Co., a partnership, of Worland, Wyoming, filed a notice of appeal, dated September 29, 1956, from a decision of the contracting officer, dated August 31, 1956, and a notice of appeal, dated February 14, 1957, from a further decision of the contracting officer, dated January 22, 1957. A hearing with respect to both appeals was had before the undersigned, a member of the Board, at Billings, Montana, on August 16 and 17, 1957.

The matters in dispute arise under a contract with the Bureau of Indian Affairs, dated September 15, 1955. The contract provided for the making of improvements to approximately 5 miles of existing gravel road on the Wind River Indian Reservation in Wyoming. It was on U. S. Standard Form 23 (Revised March 1953) and incorporated the General Provisions of U. S. Standard Form 23A (March 1953). It also incorporated, by reference, a number of the provisions of Public Roads Administration Form FP-41 (Revised July 15, 1941), entitled "Specifications for Construction of Roads and Bridges in National Forests and National Parks," which will hereinafter be referred to as the "standard specifications." The contract was on a unit price basis, the total estimated contract price being \$70,182.40.

The general provisions of the contract included the usual "changes" provision (clause 3), under which changes could be made in the drawings or specifications of the contract within the general scope thereof, subject to the allowance of an equitable adjustment if the changes increased or decreased the cost or the time of performance of the contract. The general provisions also included the usual "delays-damages" provision (clause 5), under which the contractor was not to be charged with liquidated damages "because of any delays in the

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completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor," including but not restricted to certain named causes, among which were "acts of the Government," "floods," and "unusually severe weather."

The contract provided that work on the road improvements should be started within 20 calendar days from the date of receipt of notice to proceed, and should be completed within 150 calendar days from the same date. Appellant received notice to proceed on October 22, 1955, and the date for completion of the work was thus established as March 20, 1956. Performance of the work was suspended by the contracting officer on account of winter weather conditions for a period of 126 days, beginning December 8, 1955, and ending April 11, 1956. By Change Order No. 4 the performance period was extended for a period of 4 days on account of additions of work. The combined effect of these two actions was to defer the contract completion date to July 28, 1956. The road improvements, however, were not completed and accepted until 56 days after that date, that is, on September 22, 1956.

Because of this failure to complete the work on time, appellant was assessed liquidated damages, at the contract rate of \$40 per calendar day, for the entire period of 56 days, or a total of \$2,240.

The two appeals bring before the Board a total of six claims, of which four were denied by the decision of August 31, 1956, and the remaining two by the decision of January 22, 1957. All six claims involve requests for the allowance of extensions of the contract performance time. The last claim also includes a request for additional compensation, predicated on an alleged mismeasurement of work quantities, resulting in underpayment of the contract price.

The Government contends that both of the appeals should be dismissed. One ground advanced is that the notice of the second appeal was mailed to the Department counsel instead of to the contracting officer. The Board considers, however, that such a departure from the prescribed procedures would not, in the circumstances here involved, constitute an error so fundamental as to necessitate dismissal of that appeal. Another ground is that appellant executed a final payment voucher which contained no express reservation of any claims. But when the terms of the voucher are read in the light of the pertinent correspondence and conduct of the parties, one can only conclude that its finality was not intended to extend to the six claims here in controversy. A last ground is that appellant failed to give timely notice of some of the claims. The contracting officer, however, waived this failure in his decisions by considering the claims on their merits without invoking such failure as a reason for their denial. There being no valid ground for dismissal, the Board will proceed to determine the merits of each of the claims.

CLAIM No. 1: SELECTED BORROW MATERIAL

This claim is for an extension of time in the amount of $3\frac{1}{2}$ days on account of the excavation from borrow of 469 cubic yards of allegedly hard-to-handle material.

In order to increase the stability of a section of the road that rested upon a boggy subgrade, the contracting officer under date of May 24, 1956, entered Change Order No. 4, which directed appellant to furnish and place upon that section an extra 2,000 cubic yards of material from the gravel pits designated in the contract. Although the change order recited that it was issued under the "changes" clause of the contract, the 4-day extension of the contract performance time allowed by it was calculated under article 8.6 of the standard specifications. The gist of this article, as amended by the special provisions of the specifications, is that if the quantities of work to be performed are increased above the quantities estimated in the bid schedule, "the time allowed for performance will be increased in the same ratio that the total cost of the work actually performed bears to the total cost in the bid schedule."

The material excavated under the change order included 469 cubic yards of material that was specially selected by the Area Road Engineer and that was allegedly hard to handle because of its nature and location. The actual removal of this 469 cubic yards appears to have occurred on June 1, 4 and 5, 1956. According to the load count records put in evidence by the contractor, the total volume of gravel handled on these three days was 1,340 cubic yards, an average of 447 cubic yards per day. This average was less than half of that attained during the days immediately preceding and immediately following the period in question.

Appellant's claim for an additional $3\frac{1}{2}$ days of time may be viewed as predicated either on the excusable-causes-of-delay provisions of clause 5 or on the equitable-adjustment provisions of clause 3. Whichever view be taken, it is clear that the burden of proving the claim is upon appellant,¹ and that, in order to sustain this burden, it would be necessary for appellant to show, at least, that the performance of the work called for in Change Order No. 4 delayed the orderly progress or ultimate completion of the contract work as a whole by more than the 4 days allowed by that order.²

Such is not here shown to be the case. While it appears probable that the handling of the 469 cubic yards of material extended over a period of several days, appellant has not convincingly established that

¹ *Younger Bros., Inc.*, 65 I. D. 238 (1958); *AAA Construction Company*, 64 I. D. 440 (1957); *Central Wrecking Corporation*, 64 I. D. 145, 164-166 (1957); *Vevier Loose Leaf Company, Inc.*, ASBCA No. 1500 (May 28, 1954).

² *Younger Bros., Inc.*, 65 I. D. 238, 243-45 (1958); *Chas. I. Cunningham Co.*, 64 I. D. 449, 451-452 (1957); *Central Wrecking Corporation*, 64 I. D. 145, 159-161 (1957); see *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 331-32 (1948).

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this was because of the difficulty of handling the material, rather than because of factors within appellant's control. Moreover, even if it were to be assumed that $3\frac{1}{2}$ days were necessarily and reasonably consumed in handling this material, the evidence affirmatively shows that other work under the contract was going forward at the same time, so that the work as a whole manifestly could not have been delayed by as much as the full $3\frac{1}{2}$ days claimed. That there was a marked slowdown in gravel output during the period in question is not itself sufficient to establish the claim, since some time appears to have been lost because of equipment problems, and since the 4-day extension granted would itself have allowed leeway for a slowdown to a rate of 500 cubic yards per day. This claim must, therefore, be denied.³

CLAIM No. 2: ARAPAHOE SUN DANCE

This claim is for an extension of time of 3 days on account of the holding of an Arapahoe Sun Dance at a site to which the road under improvement furnished a principal means of ingress and egress.

The Arapahoe Sun Dance is an annual observance, but both its date and its site vary from year to year. In 1956, the year here involved, the dance began on the evening of Thursday, July 19, and continued until the morning of Monday, July 23. While the dance was continuing, as well as during the hours immediately preceding and following it, there was heavy travel on the road under improvement that caused appellant to curtail its operations in order to minimize traffic hazards. The evidence indicates, however, that appellant's aggregate net loss of production during this period did not amount to more than about $1\frac{1}{4}$ days of production at its normal rate.

The Board considers that a delay of this order of magnitude arising from a cause such as that here involved was clearly within the range of foreseeability. Appellant was familiar with the business of contracting for road work, and asserts that in bidding on this job it considered "the estimated amount of traffic." It is common experience that in any given community, events of local public interest frequently occur that temporarily increase the traffic on the roads leading to their sites. A church may have a ceremony or festival, a fair may be held to raise money for an ambulance or fire engine, a football or baseball team may draw a large following of fans, a circus or carnival may come to town, a rodeo may be staged, or any one of a legion of other crowd-drawing possibilities may happen. Viewed in this light, there was nothing exceptional or uncommon in the fact that the Arapahoe Sun Dance was held while the contract was being performed, or in the

³ The total volume of gravel handled in accomplishing the purposes of Change Order No. 4 is asserted by appellant to have been approximately 3,400 cubic yards. If the volume did exceed the 2,000 cubic yards specified in the change order, the excess is included in the quantities of overrun for which additional compensation and an extension of time are being allowed under Claim No. 6.

fact that it set back the progress of the work for a net period of a day or two. That some local event would cause a temporary increase in the volume of traffic on the road to be improved was, in our opinion, a contingency so apt to happen that it would normally be allowed for in a road contractor's pre-bid traffic estimate. This claim also must, therefore, be denied.

CLAIM NO. 3: FLOODING

This claim is for an extension of time of 8 days on account of two separate categories of alleged overflows of irrigation water.

The first of these categories, for which 3 days are claimed, has to do with a flooding of the haul road that connected Pit No. 1, appellant's chief source of gravel, with the road under improvement. The haul road intersected a canal forming part of an Indian irrigation project, the water of the canal being passed underneath the haul road by means of a large culvert. When, on May 7, the first irrigation water of the 1956 season was turned into the canal, a big trash jam formed at the culvert and caused the water from the canal to overflow into the haul road. Formation of the trash jam appears to have been due to negligence on the part of personnel of the irrigation project.

The Government asserts that management of the canal was not its responsibility, and, hence, that the flooding of the haul road was not an "act of the Government" within the meaning of clause 5 of the general provisions. This, however, is immaterial for it is well settled that the causes of delay specifically mentioned in that clause are, as the language of the clause itself states, merely illustrative.⁴ The only pertinent question is whether the flooding was unforeseeable, beyond the control of appellant, and without its fault or negligence.

We think appellant could hardly have been expected to anticipate, when bidding on the contract, that its work might be delayed through an overflow caused by such an event as the trash jam that here occurred. Irrigation projects are not ordinarily so negligent in the handling of their canals for such a mishap to be considered foreseeable. Nor does it appear that any act or omission of appellant was a factor in bringing about the overflow.

The record does not support the contention of appellant, however, that the progress of the work was delayed at least 3 days as a result of the flooding and the boggy condition it created, which is asserted to have continued throughout the summer. The load counts show that the volume of gravel handled during the week beginning on May 7 was equal to 86 percent of the volume handled during the preceding week. From this it would seem that appellant succeeded in overcoming the initial consequences of the flooding fairly rapidly. While it

⁴ *United States v. Brooks-Callaway Co.*, 318 U. S. 120, 122 (1943).

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is possible that gravel output was kept up only by diverting men and equipment from other work under the contract, the record is silent as to the nature and extent of the other work that was in progress at the time of the overflow. The haul road, moreover, was a mere lane, crossing low ground, that was already wet from spring rains when the overflow occurred, and some improvement or maintenance work on it would have been necessary from time to time during the summer even if no overflow had taken place. The Board finds that appellant is entitled to an extension of time of one day by reason of the flooding of the haul road.

The second of the categories of alleged irrigation overflows, for which 5 days are claimed, has to do with the flooding of the roadside ditches along the road under improvement. The road ran through irrigated land and for most of its length was closely paralleled by an irrigation lateral. Appellant's managing partner testified that beginning on May 12, when the adjacent fields were first irrigated, and continuing until the very end of the job on September 22, the wet and muddy condition of the ditches along sections of the road that aggregated about 3 miles in length constituted a serious hindrance to the progress of the work. This condition was found principally in the ditches along the side of the road that was furthest from the irrigation lateral, that is, the side which adjoined the lower ends of irrigated fields. The partner ascribed the condition chiefly to excessive applications of irrigation water, but also to seepage or overflow from the lateral on the opposite side of the road. With respect to this lateral, he testified that certain overflows occurred because of errors by the Government in the design of some of the pipes which the contract required appellant to place beneath the road for the purpose of draining the ditch on one side into the lateral on the opposite side. The mud and water in the ditches tended to slow down appellant's operations, particularly in that its equipment would become mired while attempting to compact and grade the shoulders of the road.

Testimony on behalf of the Government was to the effect, however, that the accumulations of water in the roadside ditches encountered during the 1956 irrigation season were not in excess of those encountered in prior years, and were confined to a section of the road about three-eighths of a mile in length where there were no drain pipes of the type questioned by appellant, and that at least a part of the water problem was ascribable to the presence of a high water table, as evidenced by the frequency with which the road developed frost boils each spring.

The Board considers that appellant has not borne the burden of proving that the flooding of the roadside ditches was unforeseeable. It is, of course, common knowledge that roadside ditches frequently

contain water and are often muddy. Among the factors which may cause such a condition in an irrigated area are seepage from laterals, a high water table, return flows, and drainage from irrigated fields. Nor is over-irrigation a thing that is highly unlikely to happen. On or about August 19, 1955, appellant's managing partner made a pre-bid investigation of the work site during the course of which he examined the roadside ditches, but observed water at only one place, where there was seepage from an irrigated field. He appears, however, to have made no inquiries as to whether the conditions on the day of the investigation were typical of those customarily prevailing. It is a fair inference from the evidence that if the investigation had been more reasonably thorough, he would have readily envisaged the probability of over-irrigation of other fields along the road. Nor are the further elements of the claim adequately substantiated. Accordingly, Claim No. 3 is allowed to the extent of one day only.

CLAIM NO. 4: WEATHER

This claim is for extensions of time aggregating 22 days on account of four separate periods of alleged bad weather.

The first two periods relate to storms that appellant asserts it encountered in the course of moving its equipment to the job site, which was in the vicinity of Ethete, Wyoming, a place about 13 miles north of Lander, Wyoming. When on October 22, 1955, appellant received notice to proceed, some of its equipment was at Alcova, about 125 miles east of Lander, and the rest was at Dubois, about 65 miles northwest of Ethete. Although the expiration date of the 20 days allowed appellant for the commencement of work was November 11, it did not start to move the equipment from Alcova until November 9, and from Dubois until November 15. The record indicates that the move from Alcova was halted by severe ice conditions beginning on November 9 or 10, and that the move from Dubois was held up by a heavy snowfall on November 15. As a result, the equipment did not reach the job site from Alcova until November 14, and from Dubois until November 17. Performance of the contract work itself did not commence until November 21. For the delay in the movement from Alcova an extension of 4 days is claimed, and for the delay in the movement from Dubois an extension of 2 days is claimed.

Under the standard of "unusually severe weather" set forth in clause 5 of the general provisions, a contractor who has lost time because of bad weather is entitled to an extension for only so much of that time as would not have been lost if only the usual amount of bad weather had been encountered. And since variableness is an inherent characteristic of the weather, its unusualness is a matter that in most cases can be determined satisfactorily only by using as the basis for comparison a period which is long enough to make allowance for that

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characteristic. Thus, a realistic determination of the unusualness of stormy weather cannot be made, as appellant suggests, merely by measuring the severity of the weather on a particular day against the average weather for the same day in prior years, but must take account of the frequency with which days of like or greater severity occurred during the same months or seasons of prior years.

In the instant case the only data in evidence from which the pattern of reasonably expectable weather in the region involved may be determined consists of reports for the official weather station at the Lander Municipal Airport, some 50 to 100 miles distant from the points at which the equipment moves were halted. An analysis of this data for the years 1945 through 1954 indicates that as many as two storms of sufficient severity to halt equipment moves could reasonably be expected to occur during the 30-day period immediately following October 22. The Board finds that appellant has failed to prove that the commencement of the contract work was delayed by "unusually severe weather," and, hence, no extensions of time can be allowed for the storms that occurred during the equipment moves.

The two remaining periods of alleged bad weather are connected with a winter suspension of work. Authority for such a suspension appeared in article 8.5 of the standard specifications.⁵ The contemplated suspension was ordered on December 7, and was confirmed by Change Order No. 1, dated December 14. This order, by stating that 46 days of the contract time had expired, indicated that December 8 was to be treated as the first day of the suspension period. Appellant contends that the weather during all of the time from November 21 on was too cold and wet for effective operations, and that the resultant slow rate of progress on the work prior to the winter suspension should be compensated for by a 12-day extension of time.

The Lander weather reports for 1955 indicate that the weather was seasonal, or nearly so, through December 1. On December 2, however, the weather really began to be wintry. There was a snowfall of 15.9 inches, starting early in the day. This was followed by a sharp drop in temperature, which on December 5 took the mercury down to a low of 21 degrees below zero. By the 7th the temperature had returned to seasonal, but there were still 8 inches of snow on the ground.

⁵In pertinent part, this article provided that the "engineer" was to have "the authority to suspend the work wholly or in part by written order, for such period as he may deem necessary due to unsuitable weather," or "to conditions considered unfavorable for the suitable prosecution of the work." Under the terms of Article 8.6 of the standard specifications, as amended by the Special Provisions, a total suspension was to have the effect of stopping the running of the contract performance time, even when during it certain features of the work, either major or minor, were carried out sporadically as weather permitted. The Special Provisions defined "engineer" as meaning the contracting officer.

The evidence, in the Board's view, does not justify a finding that the weather from November 21 through December 1 was either "unusually severe" within the meaning of Clause 5 or "unsuitable" or "unfavorable" within the meaning of article 8.5. While below-freezing temperatures were regularly encountered, the weight of the evidence is to the effect that ground scarification operations were practicable with equipment of the type available, and on several days the temperature seems to have gone high enough to admit of watering operations. Moreover, as the work was just getting under way, it is not significant that full-scale production was not attained during this period.

The Board considers, on the other hand, that the snow and extreme cold which prevailed from December 2 through 7 constituted "unsuitable weather" within the meaning of article 8.5. The contracting officer appears at the time to have had a like opinion. Appellant was told on December 5, the first regular working day after the storm of the 2d, that operations were to be suspended until spring. Thereafter appellant leveled off the gravel that had been previously placed on the road, so that it would not interfere with traffic during the winter. This relatively minor operation was the only work performed from December 2 through 7.

In view of the foregoing it must be concluded that an extension of time in the amount of 6 days should now be allowed appellant. The mere fact that the winter suspension was not actually ordered until December 7 would not have then precluded, and does not now preclude, the giving of retroactive effect to the suspension by establishing December 2 as its effective date.⁶

When in 1956 the suspension was terminated, the contracting officer fixed April 12 as the date for resumption of work, but work was not actually resumed until April 16. Appellant contends that during the interval it was impossible to work because of mud resulting from the spring thaw, and that, accordingly, a 4-day extension of time should be allowed.

Prior to the termination of the winter suspension appellant, in a letter to the Area Road Engineer dated April 4, stated that it intended to resume work on April 10 unless prevented from doing so by the muddy conditions left by the last storm and the unsettled weather, and also stated that notification would be given by wire if the weather interfered with resumption of operations on the 10th. Upon receipt of this letter, Change Order No. 2 was issued by the contracting officer under date of April 9. The order stated that appellant was "authorized to resume work," and that the remaining 104 days of the contract time would run "from the date this notice is acknowledged." It included a request that appellant insert the date on which the order was

⁶ *Urban Plumbing and Heating Co.*, 63 I. D. 381, 390-92 (1956); see *De Armas v. United States*, 108 Ct. Cl. 436, 469-70 (1947).

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"received" beneath the words "Receipt Acknowledged" at its foot, and sign this endorsement. Appellant received the change order on April 11, but held it until April 16, the day when work was actually resumed. On that day appellant inserted the date April 16 beneath the words "Receipt Acknowledged," affixed its signature, and returned the order to the contracting officer.

Because of this delay, Change Order No. 3 was issued under date of May 11. In this order the contracting officer made the following application of Change Order No. 2:

You acknowledged receipt of this change order on April 16, 1956 but postal record card shows receipt on April 11, 1956. You will be allowed 104 calendar days from April 12, 1956 to the close of the day July 24, 1956 to complete the project under the terms of the contract.

The record, we think, fairly justifies a finding that the conditions at the job site during the period from April 12 through 15 were "unfavorable for the suitable prosecution of the work" within the meaning of article 8.5. The Lander weather data reveals that there was a 12-inch snowfall on April 8, together with lighter falls on April 5 and 11, and that all of the snow so deposited had melted by April 13. Appellant's managing partner testified that up through April 15 the ground remained so muddy that, had operations been attempted, the gravel trucks would have gotten hopelessly mired and substantial damage would have been caused to the road under improvement itself.

Nor can we find anything in the papers relating to the termination of the winter suspension that would disentitle appellant to an extension for the period in question. The proposal in appellant's letter of April 4 to resume work on April 10 was clearly conditioned upon the absence of unfavorable weather developments in the interim. The fact that appellant never sent any telegram advising that work would not be resumed on that day would not seem to be a sufficient reason for denying relief, since the Area Road Engineer, who visited the locality between April 10 and April 16, was in a position to have first-hand knowledge of the condition of the site. Finally, appellant's endorsement on Change Order No. 2 was a mere acknowledgment of the fact of its receipt as distinguished from an acceptance of its terms.

The Board must conclude that April 16 should be accepted as the proper date for the resumption of work after the winter suspension, and that appellant is, therefore, entitled to an extension of time in the amount of 4 days on this account.

In summary, Claim No. 4 is allowed to the extent of 10 days, and is otherwise disallowed.

CLAIM NO. 5: ROLLING SHUT-DOWN

An extension of time in the amount of 6 days is claimed on the ground that the Reservation Road Engineer shut down rolling opera-

tions for that length of time. Virtually the last work to be done under the contract was the rolling of the road surfacing. Article 122-3.2 of the standard specifications required that such work be done with rollers "of the self-powered tandem type weighing not less than 8 tons each." Appellant had a pneumatic-tired roller which was capable of meeting the 8-ton requirement, but which was not self-powered. According to the testimony of appellant's managing partner, the rolling operation was started on September 15 with this roller but was immediately stopped by the Reservation Road Engineer. On September 21 it was resumed with the same roller, seemingly by instruction of the Reservation Road Engineer, and was completed on the following day. Appellant contends that both the Reservation Road Engineer and the Area Road Engineer had given permission to use the pneumatic-tired roller in advance of its attempted use on September 15.

The evidence, however, is entirely too uncertain to support this contention. The alleged permission was oral, so too was the alleged direction to stop work, and so too was the alleged instruction to resume with the same roller. All the information we have concerning the alleged permission comes from the memory of the managing partner, and, in the key particular of exactly what the two engineers said, his recollection was vague. Nothing in his account of the discussions is inconsistent with the possibility that the engineers merely expressed a tentative opinion favorable to the use of appellant's roller without making a definite commitment, or merely said that they personally were agreeable to the use of the roller, but that the final decision would have to be made by the contracting officer.

In the absence of satisfactory proof that permission to deviate from the specification requirement concerning self-powered rollers was first given and then revoked, this claim must be denied. Clearly, appellant cannot complain of a delay which resulted from its failure to comply with a requirement of the specifications, and which finally resulted in an accommodation that served its own convenience.

CLAIM NO. 6: OVERRUNS

The first part of this claim involves a controversy over the measurement of the quantities of pit-run gravel used in performing the road improvement work. Appellant asserts that the quantities for which it is entitled to be paid exceed by approximately 4,651 cubic yards the quantities for which it has been paid. At \$0.34 per cubic yard, the total amount claimed is \$1,581.34.

A principal feature of the contract work was the placing of a course of pit-run gravel upon the road to be improved. Payment for the excavation of the gravel was provided for in item 26 (2) of the bid schedule, denominated "Unclassified Excavation for Borrow," which

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fixed the price at \$0.34 per cubic yard, and estimated the quantity at 52,000 cubic yards. The Government concedes that 59,126 cubic yards were actually excavated, and has paid appellant for this quantity. Appellant contends that the amount excavated and used on the road was at least 63,777 cubic yards.

The gravel was taken from two pits designated on the contract drawings. Pit No. 1 was the principal source, and is the only one involved in the controversy over measurement. With respect to Pit No. 2, the parties have stipulated that 3,200 cubic yards is the correct quantity.

The gravel in Pit No. 1 was overlain by a layer of overburden which, from time to time as the exposed gravel became exhausted, was stripped by appellant and piled up alongside the pit. Pursuant to a request of the Reservation Road Engineer, appellant pushed most of the overburden back into the pit once excavation for the course of pit-run gravel had been completed.

Before any work under the contract was performed, a survey of the site of Pit No. 1 was made by Fred Keene, the Reservation Road Engineer at that time. When the job was finished, a survey of the pit in its then condition was made by Bryce E. Rumph, who served as Reservation Road Engineer during the spring and summer of 1956. Using the data so obtained, Rumph computed the volume of pit-run gravel removed from Pit No. 1, determined by pit measurement procedures, as being 55,926 cubic yards. Adding to this figure the 3,200 cubic yards from Pit No. 2, the total quantity for item 26 (2) would be 59,126 cubic yards.

Within a few days after his measurement of Pit No. 1, Rumph submitted the final monthly construction report for the job. This report included a tabulation of the dollar value of the work in place for each of the contract items, calculated on the basis of the unit prices set forth in the bid schedule. The value of the work-in-place figure for item 26 (2) was \$21,446.86, which, at the unit price of \$0.34 for that item, was equivalent to 63,079 cubic yards. This quantity appears to have been derived from the load count kept by appellant, and in explanation of it Rumph appended to his report the following note:

Volume of Pit Run, Item #26 (2) measured by End Area Method from Pit #1 totaled 55,926 Cu. Yds. plus 3,200 Cu. Yds. measured by Load Count from Lower Pit.

This 55,926 Cu. Yds. is considerably under the Contractor's Load Count. This could be due to the swelling of the overburden that was pushed back into the Pit #1. This material is extremely dry and powdery.

Rumph's use of 63,079 cubic yards as the basis for his dollar figure for item 26 (2) is entitled to weight, for he was the chief on-site representative of the contracting officer throughout the period while

gravel operations were in progress, save for the few initial days of work in 1955.

Upon receipt of the final monthly construction report, payment was made to appellant on the basis of the dollar values ascribed to the various items in that report, except that the sum of \$1,344.02 was deducted from the dollar value of item 26 (2) on the ground that the measurement provisions of the contract made it obligatory that payment be based on an actual pit measurement, and that 59,126 cubic yards was, therefore, the correct figure. The sum deducted represented the difference between that figure and 63,079 cubic yards, at \$0.34 per cubic yard.

Following complaints by appellant that the deduction was unjustified, another survey of Pit No. 1 was made, this time by R. E. Howell, who had succeeded Rumph as Reservation Road Engineer. Upon the basis of the new survey, in conjunction with the original Keene survey, Howell computed that the quantity taken from Pit No. 1 was 61,017 cubic yards, or 5,091 cubic yards more than the quantity computed by Rumph for the same pit. While the cross-sections and computation sheets indicate that the Howell measurement included only Pit No. 1, the figure of 61,017 cubic yards has been consistently assumed by both parties to be inclusive of the 3,200 cubic yards from Pit No. 2. Thus, the Assistant Area Director, in a letter dated December 5, 1956, informed appellant that the difference between the Rumph and Howell measurements was 1,891 cubic yards, that is, 3,200 cubic yards less than the actual difference of 5,091 cubic yards.

The evidence shows that in the Howell measurement no allowance was made for certain quantities of gravel that appellant admittedly excavated from Pit No. 1 for purposes outside the purview of any of the pay provisions of the contract. Since appellant has the burden of proof, any doubt as to the size of these quantities must be resolved against it. The findings of the Board on this point are that 230 cubic yards were used in performing work for Harry J. Lindauer, that 727 cubic yards were used in performing work for St. Michael's Mission, and that 300 cubic yards were used in improving the haul road leading to Pit No. 1. These amounts aggregate 1,257 cubic yards. Deducting the amounts of gravel used for non-pay purposes, the Howell measurement of Pit No. 1 is reduced to 59,760 cubic yards. Adding to this figure the 3,200 cubic yards from Pit No. 2, the total quantity for item 26 (2), according to that measurement, becomes 62,960 cubic yards.

Throughout the measurement controversy, appellant has relied heavily upon the load count records it kept of the gravel removed from the two pits. These daily tallies add up to an aggregate of 63,041 cubic yards. As most of the gravel hauling was performed by subcontractors, who were paid an agreed-upon price for each cubic yard hauled, the load count records possess a certain in-built guarantee

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of integrity. The evidence indicates, moreover, that gravel for use in performing work on private property or for other purposes not compensable under item 26 (2) was not included in them.

The Government relies chiefly on the contention that the contract provides for ascertaining the amount of gravel to be paid for through pit measurement procedures and not through load counts; and that the Rumph measurement of 59,126 cubic yards was made in accordance with the procedures prescribed by the contract and should, therefore, be regarded as conclusive. This contention is based upon article 26-4.1 of the standard specifications, which reads as follows:

The yardage to be paid for shall be the number of cubic yards of material (including the yardage of overburden stripped from pits) measured in original position and computed by average end area method, excavated and acceptably disposed of in embankment, backfill or as otherwise ordered, except that when case 2 is called for in the bid schedule, the yardage of overburden stripped from pits (unless used as borrow material) shall not be included in the yardage to be paid for. The measurement shall not include the yardage of any excavation performed prior to the taking of elevations and measurements of the undisturbed ground.

In the present case, as a "case 2" bid was involved, the yardage of overburden was not to be included in the yardage to be measured for payment. The excavated stratum of gravel below the stratum of overburden was to be paid for and, for this purpose, was to be "measured in original position." This phraseology imports that what is to be measured is the space occupied by the gravel before it was removed, that is, the space between the underside of the overburden and the bottom of the pit after excavation of the gravel. It seems rather obvious that in order to make such a measurement it would be necessary to determine the elevation of the underside of the overburden in its original position, either by making borings prior to the stripping of the overburden, or by making measurements of the depth of the pit after the stripping but before removal of the underlying gravel, or by some other means.

What was actually done in the present case appears, however, to have been quite different. The elevation of the original ground surface was determined, but there is no indication that the elevation of the underside of the overburden was ever determined. The excavated pit was twice surveyed, but only after it had been partially filled up with overburden, and, consequently, the surveys revealed only what was then left of the pit, rather than its condition when gravel excavation was completed. The net result is that both the Rumph measurement and the Howell measurement appear to include space that was originally occupied by overburden and which should not have been measured for payment, and to exclude space that was originally occupied by gravel, but subsequently refilled with overburden, and which

should have been measured for payment. Thus, it cannot be said that either measurement complied with the contract requirement that the gravel be "measured in original position."

Close adherence to this requirement was a matter of considerable practical importance. It is well known that when virgin earth is excavated it swells and, unless compacted by artificial means, occupies more space than it did before its initial natural state of compaction was disturbed by excavation. Both parties here consider that swelling occurred, but differ as to its degree. Under the methods of measurement that seem to have been actually followed, the space measured for payment was decreased in the amount, be it large or small, by which the swelling increased the volume of the overburden, whereas, had there been strict adherence to the specifications, the swelling would have had no effect upon the quantities measured for payment.

It is, of course, true that allowance for the swelling could have been made when the pay quantities were computed from the pit measurements. The evidence indicates rather plainly, however, that no such allowance is reflected in the Rumph figure of 55,926 cubic yards for Pit No. 1. The Government asserts that Howell did make such an allowance, but the evidence on this point is inconclusive. In any event an allowance for swelling of overburden, based as it necessarily would have to be largely on the good judgment of the person making the computation, would be a substitute for, and not a compliance with, the requirement that the material to be paid for be "measured in original position."

The Board finds it necessary to conclude, therefore, that neither the Rumph nor the Howell measurement conforms to article 26-4.1 of the standard specifications. The changes wrought in Pit No. 1, moreover, would seemingly render it impossible for a proper measurement to be now made.

The situation thus presented is similar to that which confronted the Court of Claims in *Tacoma Dredging Co. v. United States*, 52 Ct. Cl. 447 (1917). There the Government in administering a unit-price dredging contract failed to comply with the measurement provisions of the contract, whereupon the contractor sought payment for certain material that had been actually dredged, but that would not have been included in the cubic yardage to be paid for if the measurement provisions had been followed. The court held that, as the measurement provisions had not been observed, it would have to ascertain the number of units to be paid for in a manner consistent with the intention of the parties, and that since the "spirit of the contract was that payment should be made for each unit of material removed," compensation would be allowed for all the material actually dredged.

There are in the present case three figures that afford a basis on

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which the number of units removed under item 26 (2) may be fairly ascertained. The first is the figure of 63,079 cubic yards reflected in the value of the work in place as reported by Engineer Rumph. The second is the figure of 62,960 cubic yards derived from the pit measurement made by Engineer Howell, as adjusted for gravel used for non-pay purposes. The third is the figure of 63,041 cubic yards obtained from appellant's load count records. The average of these three figures is 63,027 cubic yards.

Each of these figures, while not beyond question in every particular, appears to possess a substantial measure of reliability. Furthermore, by reason of their close correspondence in amounts, each tends to support the correctness of the others. In view of these facts, the Board considers that the most accurate result will be obtained in the present case if the average is accepted as the measure of the quantities of gravel excavated and used for purposes compensable under item 26 (2), and, accordingly, finds that 63,027 cubic yards is the volume of gravel for which appellant is entitled to be paid under that item. This is 3,901 cubic yards more than the 59,126 cubic yards for which appellant has been paid. At the contract price of \$0.34 per cubic yard, the additional compensation due appellant under item 26 (2) on account of these 3,901 cubic yards of overrun is \$1,326.34.

The second part of Claim No. 6 consists of a claim by appellant that by reason of the various overruns in the contract quantities, it is entitled to a proportionate extension of time in the amount of 22 days under the formula set forth in article 8.6 of the standard specifications and quoted in the discussion of Claim No. 1.

The record indicates that the actual contract price, as computed by the Government on the basis of the quantities of work performed and the unit prices bid for the various items, was \$79,776.87. This figure reflects the combined effect of all overruns and underruns, except that it does not include the \$1,326.34 which the Board has determined to be due appellant under item 26 (2). With the addition of this latter sum, the actual contract price becomes \$81,103.21. This figure exceeds by \$10,920.81 the estimated price of \$70,182.40 stated in the bid schedule. Percentagewise, the actual price exceeds the estimated price by 15.56 percent. Applying this percentage to the 150 days of contract performance time, and rounding the result to the nearest integer, gives 23 days as the additional period allowable under the time formula of article 8.6. The 4 days granted by Change Order No. 4 must, however, be deducted from this period, since they were determined by applying the formula to overruns that are included within the total excess of \$10,920.81. Hence, 19 days is the net amount of additional time now allowable under article 8.6.

The Government seems to contend that article 8.6 is not applicable to the present case in view of article 4.3 of the standard specifications.

Article 8.6 states that its time formula shall be applied only to increases in quantities that are *not* covered by a supplemental agreement executed pursuant to article 4.3. Article 4.3, as amended by the special provisions, authorizes the execution of supplemental agreements only when alterations in the plans or specifications are made pursuant to the "changes" or "changed conditions" clauses of the contract, and then only when such alterations result in either a change in quantities exceeding 25 percent for the contract as a whole, or a change in quantities exceeding 25 percent for a major pay item, or a substantial change in design or construction. In the present case there is no indication that any of these conditions existed, or that any supplemental agreement was executed, and, accordingly, no ground for a holding that the time formula is inapplicable.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the contracting officer is instructed to take appropriate action for the allowance of extensions of time in the aggregate amount of 30 days and additional compensation in the amount of \$1,326.34, and to this extent only the decisions appealed from are reversed.

HERBERT J. SLAUGHTER, *Member*.

I concur:

THEODORE H. HAAS, *Chairman*.

Mr. SEAGLE, concurring:

I concur in the results which have been reached in this case, although I do so with reluctance with respect to the extension of the suspension-of-work period involved in Claim No. 4. This is not a case in which the contracting officer unreasonably or arbitrarily refused to enter any suspension order at all. Indeed, he suspended the work for a period of over four months. While the Board has the authority to extend the suspension period retroactively in a proper case, some latitude must be allowed to the contracting officer in determining when to begin and end the suspension period, and I doubt that the Board should exercise its discretionary authority to extend it by a few days at either end, particularly in the circumstances of the present case. It appears that the appellant failed to ask for an earlier suspension of work until long after the suspension order was entered, and that it took advantage of the contracting officer in maneuvering to get the suspension order terminated at a later date. However, since these considerations involve questions of policy rather than of law, I think that I should do no more than to express my doubts.

WILLIAM SEAGLE, *Member*.

HINES GILBERT GOLD MINES COMPANY**A-27732***Decided November 13, 1958***Mining Claims: Surface Uses—Mining Claims: Special Acts**

Verified statements required under the act of July 23, 1955, are properly rejected and the use of surface resources denied to the mining claimants when such statements are filed after termination of the period of 150 days prescribed by the statute for filing such statements.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Hines Gilbert Gold Mines Company has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated May 14, 1958, which affirmed a decision of the acting manager of the land office at Sacramento, California, dated September 12, 1957, rejecting the verified statement filed by the company for the purpose of protecting its rights to the surface resources of certain unpatented mining claims under section 5 of the act of July 23, 1955 (30 U.S.C., 1952 ed., Supp. V, sec. 613), on the ground that the filing was late.

The act of July 23, 1955, limits the uses which holders of mining claims located after that date may make of the surface resources on the claims and requires holders of claims previously located to respond to a published notice requiring such action by filing a verified statement setting forth the pertinent information which indicates that there is an asserted claim in existence "within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice) * * *." The pertinent notice was published for the first time on March 21, 1957. The appellant's verified statement was filed on August 20, 1957, 152 days later. In his decision of September 12, 1957, the acting manager rejected the statement because of the late filing and pointed out that the statutory consequences were the subjection of the mining claims to the restrictions on use of surface resources specified for claims located after the enactment of the act of July 23, 1955.

In its appeals to the Director and the Secretary, the appellant has contended that the rejection of its statement enlarges the intent of the Congress to require action against only those mining claimants whose locations are in flagrant violation of the mining laws and that it penalizes the appellant because of unnecessary delays in the processing of applications for patent on mining claims by the Bureau of Land Management. The appellant had apparently filed on May 29, 1957, an application for patent covering 5 of the 10 claims listed in its verified statement.

There is no merit in these contentions. The statute is clear in its requirement that if the agency responsible for administering the surface resources publishes a notice calling for the filing of verified statements as to any particular land, the obligation to file the statements is imposed upon all holders of mining claims on that land, the legitimate holders as well as the illegitimate. Furthermore, the statute is precise in its delineation of the period during which the statements must be filed. The Secretary of the Interior is given no discretion as to the time when the privilege of filing such statements terminates; the statute states explicitly that the period is 150 days and itemizes with particularity the consequences of failure to file within the 150 days.

In *Seymour Gray et al. v. Milner Corporation*, 64 I.D. 337 (1957), the Department pointed out that under section 2325 of the Revised Statutes (30 U.S.C., 1952 ed., sec. 29) this Department is required to assume that if no adverse claim is filed against an application for patent on a mining claim within the period of 60 days following the commencement of publication of a notice that application for patent has been made, no such claim exists, and it is precluded from consideration of any claim filed after the end of the 60-day period without regard to the merit of such claim. Likewise, the Department held in *United States v. R. B. Borders et al.*, A-27493 (May 16, 1958), and the cases cited therein, that mining claimants who wish to obtain the benefits of the act of August 12, 1953 (30 U.S.C., 1952 ed., Supp. V, secs. 501-505), must post and file amended notices of location not later than 120 days after August 12, 1953, in conformity with the language of the statute.

The position of the Department in the cases cited, as in the instant case, reflects the principle that ours is a government of law which applies to those who administer a particular law as well as those whose interests it serves. If this Department should assume that it may enlarge or restrict the periods which the Congress has prescribed for the performance of certain acts in accordance with its own concepts of convenience and equity, the result would be chaos. So long as the Department is bound to observe the law as it is written, those whose interests are affected by it may rely upon the law to afford the necessary protection of their rights and govern their conduct accordingly. The appellant has failed to meet the requirements of the law; the Secretary is without authority to save it from the consequences of its failure.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17

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F.R. 6794), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

**REQUEST FOR INTERPRETIVE OPINION ON THE SEPARABILITY
OF TRIBAL ORGANIZATIONS ORGANIZED UNDER SECTIONS 16
AND 17 OF THE INDIAN REORGANIZATION ACT**

Indian Reorganization Act

Section 16 was enacted to facilitate and to stabilize tribal political organizations. Section 17 was enacted to permit a tribe so organized to charter a business corporation to facilitate its business activities. They are separate legal entities, having different powers, privileges and responsibilities.

Indian Tribes: Generally

A Tribe organized under section 16 of the Indian Reorganization Act is a political body and is a separate entity from a corporation chartered under section 17 of the Indian Reorganization Act, having different powers, privileges and responsibilities.

M-36515

NOVEMBER 20, 1958.

To the COMMISSIONER OF INDIAN AFFAIRS.

You desire an opinion whether an Indian tribe organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. sec. 476), is the same legal entity as a corporation chartered on behalf of the newly organized tribe pursuant to section 17 of that act (25 U.S.C. sec. 477). You refer specifically to Solicitor's Opinion M-36119 of February 14, 1952, which distinguishes the two tribal organizations with respect to the making of certain contracts.

The Solicitor's opinion, to which you refer, clarifies and emphasizes the distinction between the powers of the constitutional tribal organization and those of the tribal corporation. A contract for the conveyance of land by the political body was considered therein as subject to the provisions of section 2103 of the Revised Statutes (25 U.S.C. sec. 81). The opinion also stated that Congress has, by section 17, empowered the Secretary to charter corporations having "far-reaching powers with respect to the conduct of business activities," including the making of contracts subject only to the limitations imposed by such section and by its charter. That opinion concluded that the purpose of section 17 was to authorize the Secretary, in his discretion, to grant any or all powers incidental to the conduct of business which

a corporation can legally exercise, except the power to sell or mortgage reservation lands, or to lease them for a period in excess of 10 years.

A study of the legislative background of the Indian Reorganization Act makes clear the distinction between the organization of an Indian municipal government under section 16 of the Indian Reorganization Act and that of a business corporation under section 17 of the act. The original bills (S. 2755 and H.R. 7902, 73d Cong.) introduced in 1934 to terminate the allotment system and to reestablish tribal autonomy provided for the issuance of a single charter by the Secretary of the Interior to defined communities of Indians. Such a charter would grant powers of government and such privileges of corporate organization and economic activity as seemed necessary to enable the proposed organization to act as a federal governmental agency and also to exercise the privileges of business corporations. The committee objected to the proposed legislation, suggesting that no one would give credit to such an organization because of its immunities, and that the United States might be liable for tribal actions (H.R. 7902, Hearings, pp. 98-100). The bill was redrafted as Senate 3645. Senate 3645, reported by Senator Wheeler's Committee (Report No. 1080, May 10, 1934), permits the organization by the tribe of a separate business corporation in which any part, or all, of the tribe's property and business interests may be vested. Commenting on the redrafted measure, the committee report carefully distinguishes the political organization from such a business corporation.

The purpose of Congress in enacting section 16 of the Indian Reorganization Act was to facilitate and to stabilize the tribal organization of Indians residing on the same reservation, for their common welfare. It provided their political organization. The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device, which charter cannot be revoked or surrendered except by act of Congress. This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, the powers, privileges and responsibilities of these tribal organizations materially differ.

It is not to be assumed, however, that where tribal property held in a trust or restricted status comes into the ownership or control of a tribal business corporation, a change in the trust or restricted status is by that fact alone effected. Although such property when turned over to the business corporation by contract or conveyance, can be

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managed or disposed of by corporate officers as provided in the corporate charter, it is still subject to the laws of the United States and regulations of the Department of the Interior governing such property. As an illustration of Congressional intention, although tribal business corporations organized under section 17, *supra*, are given "specific power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property," Congress has further provided in this section that "no authority shall be granted to sell, mortgage or lease for a period exceeding ten years any of the land included in the reservation."

EDMUND T. FRITZ,
Deputy Solicitor.

MARION Q. KAISER
CHARLES C. KAISER

A-27691*Decided November 25, 1958*

Mining Claims: Lands Subject to—Withdrawals and Reservations: Power Sites

Lands in power site withdrawals were not open to location of mining claims until the adoption of the Mining Claims Rights Restoration Act of 1955 on August 11, 1955, and any attempted location before that time subsequent to the withdrawal of the land for power site purposes is null and void.

Mining Claims: Lands Subject to—Withdrawals and Reservations: Generally

An attempt to locate a mining claim made while the land is included in an application to withdraw the land from location or entry under the general mining laws for the use of a Federal agency is invalid since the notation of the filing of the application on the land office records segregates the land from lands available for disposal under the public land laws to the extent that the proposed withdrawal would.

Withdrawals and Reservations: Generally

The regulation of the Department providing that the notation of the filing of an application for withdrawal shall segregate the land from disposal under the public land laws to the extent that the proposed withdrawal would is a reasonable regulation which is essential to effectuate withdrawals.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Marion Q. and Charles C. Kaiser have appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated March 11, 1958, which affirmed a decision of the manager of the land office at Portland, Oregon, dated March

30, 1956, declaring the Old Timer placer mining claim in the S1½ of lot 1, sec. 25, T. 34 S., R. 8 W., W.M. Oregon, null and void.

On February 20, 1956, the appellants filed with the Portland land office a document entitled "Amended Notice of Location (or Relocation)" in which they stated that on January 20, 1956, they had amended, located, and relocated the Old Timer Placer Claim, which, they said, was the same placer described in a notice of location filed in the Mining Records of Josephine County, Oregon, on July 25, 1932.

The records of the land office show that the land embraced by the mining claim was included in Power Site Reserve No. 143, Oregon No. 8 on May 8, 1926, under section 24 of the Federal Power Act (16 U.S.C., 1952 ed., sec. 818). On August 1, 1955, the Department of Agriculture filed an application, Oregon 04645, pursuant to 43 CFR 295.9 for the withdrawal of approximately 8,000 acres of land in the Siskiyou National Forest, including the placer claim, from location or entry under the general mining laws, subject to valid existing rights, for use as a public recreational area. The information relating to the withdrawal was noted on the land office records no later than August 5, 1955. Notice of the proposed withdrawal was published in the Federal Register on March 14, 1956 (21 F.R. 1606), and the land was withdrawn by Public Land Order No. 1726 published in the Federal Register on September 10, 1958 (23 F.R. 7002).¹

Until the passage of the act of August 11, 1955 (30 U.S.C., 1952 ed., Supp. V, secs. 621-625), the fact that the land in question was reserved as a power site prevented the location of a valid mining claim on it, if the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act (*supra*). *Harry A. Schultz et al.*, 61 I.D. 259 (1953); *Day Mines, Inc.*, 65 I.D. 145 (1958). Since the lands in question had not been restored to entry, the original location of the mining claim in 1932 was invalid. *Id.*

The act of August 11, 1955 (*supra*), known as the Mining Claims Rights Restoration Act, opened lands withdrawn or reserved as power sites to mineral entry under the mining laws subject to certain conditions. One of these conditions is that the locator file a notice of his location in the land office of the land district in which the claim is located. 30 U.S.C., 1952 ed., Supp. V, sec. 623. Presumably it was in an attempt to comply with this provision that the appellants filed their notice of February 20, 1956. Upon the filing of a location notice by the locator of a placer claim the act provides for certain steps to be

¹The land in question was not withdrawn under the jurisdiction of the Secretary of Agriculture but under the jurisdiction of the Secretary of the Interior presumably for the reason that the land, along with other land, was transferred effective June 22, 1956 (21 F.R. 4525), to the administrative jurisdiction of the Department of the Interior for administration with the Oregon and California revested lands pursuant to the act of June 24, 1954 (48 U.S.C., 1952 ed., Supp. V, sec. 1181b).

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taken for the purpose of determining whether and under what conditions the locator may engage in placer mining. 30 U.S.C., 1952 ed., Supp. V, sec. 621(b); 43 CFR 185.176, as added, 23 F.R. 5436 (Circular 2007).

However, in this case it was not necessary for the manager to proceed further under the act of August 11, 1955, because for another reason the land was not open to mineral location.

The application for withdrawal filed by the Department of Agriculture was made pursuant to a regulation which at the time it was filed read:

Segregative effect of application by Federal or State agency. (a) The recording in the serial register and the noting on the official plats and in the tract books maintained by the land office for the area, or by the Washington office of the Bureau of Land Management if there is no land office for the area, of information indicating that an application for the withdrawal or reservation of lands has been received from a Federal or State agency shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands. (43 CFR 295.10(a)).²

The effect of this regulation was to segregate the land from mineral location when the conditions stated in the regulation had been complied with. As the Director pointed out, these steps were taken no later than August 5, 1955, well before the attempted relocation of the placer claim. Thus, the mining location having been made at a time when the land was temporarily reserved from location under the general mining laws was invalid.³ *Mrs. Ethel H. Myers*, 65 I.D. 207 (1958).

The appellants contend that the proposed withdrawal has not been consummated and that it is therefore ineffective to remove mineral ground from location under the mining laws; that the regulation prohibiting mineral locations on the basis of proposed withdrawals is contrary to the statute and Executive order (E.O. 10355, May 26, 1952, 17 F.R. 4831) authorizing withdrawals only by the President, the Secretary of the Interior, the Under Secretary of the Interior, and the Assistant Secretaries of the Interior; and that the regulation giv-

² The pertinent provision is now found in 43 CFR, 1957 Supp., 295.11(a), as revised on August 12, 1957.

³ The act of August 11, 1955, does not validate mining claims located prior to the date of the act on lands, which at the time of the location, were withdrawn for power site purposes. *Day Mines, Inc.*, *supra*.

ing the same effect to a mere application for a withdrawal as to an actual withdrawal is without legal authority.

As indicated earlier, the proposed withdrawal has, since the appellants filed their appeal, been approved by the Assistant Secretary of the Interior and a public land order published which permanently withdraws the land, among others, from all forms of appropriation under the mining laws (P.L.O. 1726, *supra*).

As to the appellants' contention that the regulation authorizes withdrawals by persons to whom such authority has not been delegated, I would like to point out that the temporary segregative effect given to the filing of an application for withdrawal results from a regulation issued by the Secretary of the Interior. The filing of the application alone would not have such effect. It is the regulation issued by the Secretary which operates to segregate the land, although it is the filing of the application that triggers the operation of the regulation. Consequently it is improper to say that the segregation of the land is the act of someone who is not authorized to make withdrawals under Executive Order 10355.

The Secretary issued the regulation under the authority granted him by Congress to devise regulations necessary to carry out the public land laws and the work of his department. Rev. Stats. secs. 161, 2478; 5 U.S.C., 1952 ed., sec. 22, 43 U.S.C., 1952 ed., sec. 1201. Executive Order 10355 (*supra*), section 1 of which delegated to the Secretary the President's statutory and other authority to withdraw and reserve public lands, authorizes the Secretary in section 2 to make such rules and regulations as he deems necessary for the exercise of the authority delegated to him. The Secretary's authority to make reasonable rules and regulations relating to the disposition of the public lands has often been upheld. *Cosmos Exploration Company v. Gray Eagle Oil Co.*, 190 U.S. 301 (1903), and cases cited in note 2 to 43 U.S.C.A., sec. 1201.

There is nothing unusual in providing that an application will, until it is disposed of, segregate the land applied for from other types of applications or entry. For example, until recently an application to lease public land under the Mineral Leasing Act segregated the land applied for from mineral location.⁴ *Filtrol Company v. Brittan & Echert*, 51 L.D. 649, 653 (1926). Similarly until the repeal of the Timber and Stone Act (43 U.S.C., 1952 ed., secs. 311-313) by the act of August 1, 1955 (69 Stat. 434), an application to purchase land under that law barred any other person from filing on that land

⁴ The act of August 13, 1954 (30 U.S.C., 1952 ed., Supp. V, sec. 521 *et seq.*), now permits mineral locations on lands covered by an application or offer for a permit or lease.

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until the application had been disposed of adverse to the applicant. 43 CFR 285.21.⁵

In general, the purpose behind the segregative effect given these and other applications is simply to protect the applicant, who must wait upon action by the Department, from the assertion by others of rights to the lands while the applicant is prevented from taking any steps to protect the lands he seeks. Otherwise it would be difficult to devote large blocks of public lands to a specific use free from intervening claims of others to the tracts within the larger area whose existence could complicate or confuse the purpose for which the lands are sought. In the instant case, a withdrawal of approximately 8,000 acres was requested for devoting the land to public recreational use. If before the withdrawal could be effectuated by issuance of a public land order mining claims could be located on the land, the purpose of the withdrawal could be completely or largely vitiated by the location of mining claims on the land. Thus, even though it were ultimately determined, as it was in this case, that the land should be withdrawn for recreational purposes, the withdrawal could be effectively nullified by the intervening location of mining claims. The purpose of the regulation in issue is to preserve the status of the land pending final action on the withdrawal and it is a necessary incident to the making of withdrawals. The regulation is a reasonable method of achieving this desirable purpose.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F.R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF GLENN DUSKY

IBCA-130

Decided December 11, 1958

Contracts: Specifications—Contracts: Interpretation—Contracts: Payments

Under specifications which provided that the contractor furnish and install in a compacted state gravel bedding for a concrete lining in an irrigation lateral and that the gravel bedding so installed should be measured for payment in the most practicable manner, either to the outlines of the areas covered with gravel bedding and to an average thickness, or in approved vehicles at the point of delivery, the contracting officer had a choice be-

⁵ See also 43 U.S.C., 1952 ed., sec. 300 (reservation of lands containing water holes and lands for stock driveways) and the pertinent regulation 43 CFR 295.7(a), (b), and (c); 43 CFR 105.2 (segregative effect of application for reinstatement of canceled entry).

tween these two alternative methods of measuring the gravel bedding for payment. Whichever method was chosen, however, payment would have to be made for the gravel in a compacted state, and, if payment were based on loose truck measurements of the gravel, a compaction factor would have to be applied to the gravel so measured. It is apparent that if either method of measuring the gravel for payment presupposed its measurement in a compacted state, the other method must also presuppose this, since both methods, to be equitable must produce equivalent results. The fact that bidders were unable to determine the factor of compaction in advance, since the source of the gravel was subject to the approval of the contracting officer, proves no more than that the contract involved elements of uncertainty or risk for the contractor. Differences of nomenclature to be found in various items of the schedule and specifications with respect to payment do not demonstrate an ambiguity in the provisions for payment of the gravel bedding, since the language was not exactly parallel and the provisions for the performance of the various items differed substantially. The fact that Government inspectors kept a truck count tally of the gravel bedding is not a practical construction requiring payment for the gravel by loose truck measurement, since they reported generally all operations under the contract; the information was useful for other purposes, such as the making of progress payments; and the contracting officer was not bound to determine how the gravel should be paid for until after it had been placed. The contracting officer did not abuse his discretion in paying for the gravel bedding on the basis of cross sections taken prior to the placing thereof, since the record shows that the practice of using cross sections in measuring earthwork for payment is common, and the contractor has failed to bear the burden of proving that there were circumstances that made the use of the cross sections unfair.

BOARD OF CONTRACT APPEALS

Glenn Dusky, an individual, of Moses Lake, Washington, has appealed from the findings of fact and decision of the contracting officer dated July 10, 1957, denying the appellant's claim for additional compensation in the amount of \$4,606 under Contract No. 14-06-116-5751 with the Bureau of Reclamation, hereinafter referred to as the Bureau.

The contract, which was dated December 4, 1956, was on U.S. Standard Form No. 23- (Revised March 1953), and incorporated the General Provisions of U.S. Standard Form 23A (March 1953) for construction contracts.

The contract provided for the installation of blended earth lining and concrete lining in the EL29 Lateral in Block 421 of the Columbia Basin Project, Washington, which is situated about 4 to 5 miles southeast of Moses Lake in Grant County, Washington. The blended earth lining, with a 6-inch gravel cover, was to be installed between Station 208+77.20 and Station 220+00 and between Stations 245+17.75 and Station 269+63.25. The concrete lining was to be installed with gravel bedding between Stations 220+40 and Station

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234+85, which is a distance of somewhat over a quarter of a mile. The length of the entire work area was approximately three-quarters of a mile. The estimated contract price for all the units of work or material under the contract was \$59,000.

In the schedule there were listed 12 items, which included "Excavation from borrow" (Item 3), "Gravel Bedding for concrete lining" (Item 6), and "Compacted earth lining" (Item 7). Only Item 6, of which the estimated quantity was 1600 cubic yards, is directly involved in the present appeal, the question being whether the appellant was paid on a proper basis for the gravel bedding installed in the lateral as a subgrade for the concrete lining.

Notice to proceed with the work was acknowledged by the appellant December 6, 1956. As under paragraph 16(a) of the specifications the work was to be completed within 100 calendar days of this date, the completion date was March 21, 1957. The work was accepted as completed on April 6, 1957. However, no question of liquidated damages is involved in the present appeal.

A peculiarity of the present case is that, although the contract was awarded to the appellant, it was performed in its entirety by a joint venture formed for this purpose by Glenn Dusky and the L. D. Shilling Company, who subdivided the work between them. Glenn Dusky performed the required excavation but the placing of the gravel bedding and concrete lining was done by the L. D. Shilling Company.

A hearing for the purpose of taking testimony was held before the undersigned at Washington, D.C., on July 26 and 27, 1958. The only witness who appeared to testify on behalf of the appellant at the hearing was Lloyd D. Shilling, the head of the company bearing his name. Although Glenn Dusky did not appear at the hearing in person, counsel for the appellant presented at the hearing two affidavits executed by him, one of which constituted an authorization to L. D. Shilling to represent him at the hearing of the appeal, and the other of which was evidentiary.

The requirements for furnishing and placing the gravel bedding for the concrete lining were indicated in paragraphs 36 and 37 of the specifications, and in the drawings. The gravel bedding was to be placed to a minimum thickness of 3 inches on the sides and bottom of the lateral as a base for the concrete lining, and if there were any eroded areas in the foundation "beyond the prescribed lines of the underside of the gravel bedding," these could be required to be filled. The material for the gravel bedding was to consist of "pit-run sand and gravel reasonably well graded and from which all stones having a maximum dimension of more than 1 and 1/2 inches have been removed," and the gravel was to be secured "from borrow pits or sources

approved by the contracting officer." The lateral section on which the concrete lining was to be placed was to be filled completely to the lines of the underside of the lining with the graded gravel material, and it was to be thoroughly compacted in accordance with a prescribed method.

The specifications contained two provisions that are relevant to the measurement of and payment for the furnishing and placing of the gravel bedding. Paragraph 4 of the General Conditions of the specifications headed "Quantities and unit prices" included the provision:

Payment at the prices agreed upon will be in full for *the completed work* and will cover materials, supplies, labor, tools, machinery, and all other expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided [*Italics supplied*].

And, paragraph 36(d) provided:

Measurement, for payment, for gravel bedding will be made *in the most practicable manner as determined by the contracting officer; to the outlines of the areas covered with gravel bedding and to an average thickness, or in approved vehicles at the point of delivery*. Payment for gravel bedding for concrete lining will be made at the unit price per cubic yard bid therefor in the schedule, which unit price shall include the cost of furnishing, hauling, placing, moistening, *compacting*, and all other costs for completing the work required by this paragraph [*Italics supplied*].

The reach of the lateral that was to be concrete-lined under the Dusky contract had also been constructed by the L. D. Shilling Company, and had first been placed in service in 1953. As originally constructed, however, the lateral was not lined, and because of the porous nature of the soil considerable seepage had been experienced. This, indeed, was the primary reason for lining the lateral with compacted earth and concrete under the Dusky contract.

The water was let out of the lateral on October 19, 1956, and because of the nature of the soil drained rapidly. The work under the Dusky contract commenced on or about December 10, 1956. On December 20 and 21, 1956, while the section of the lateral in which compacted earth lining was to be installed was still being excavated, a Government survey party took cross sections of the area to be filled with gravel bedding. The cross sections were taken on an average of 40-foot centers, and in all there were 331 measurements, the spacing ranging from a minimum of 5 feet to a maximum of 62½ feet. The hauling of gravel commenced on January 9, 1957, after a source for the gravel had been approved by the contracting officer.¹ The hauling of gravel

¹ The Government had contemplated that the gravel would be taken from the Pot Holes Reservoir, where one of its own pits was located, but the appellant requested permission to take the gravel from a pit owned by the State Highway Department, apparently because it was less distant from the site of the work. This gravel, which consisted of waste

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was continued until January 14, 1957. All other operations had been shut down two days previously because of the onset of winter weather. Before the shut-down approximately 1,800 cubic yards of gravel had been hauled to the site of the work, dumped in the bottom of the canal and leveled out with a bulldozer. The hauling and placing of gravel was resumed on March 11 and continued until March 28.

In putting down the gravel bedding, however, the operator of Shilling's motor grader kept calling for the delivery of far more gravel than was actually needed, and a good part of the gravel delivered had to be wasted alongside the banks of the canal. If it be assumed that every load of gravel hauled to the site of the work completely filled the beds of the trucks, 3,658.1 cubic yards of gravel was the amount hauled, and of this amount 1,040.3 cubic yards was wasted. As the gravel wasted was subjected to compaction by travel of the equipment, the amount of the waste in terms of loose truck measure had to be computed, and this was done by agreement between Government personnel and the appellant by applying a 20 percent compaction factor to the waste piles.

While the work was in progress, there was no mutual understanding between the contracting officer or any of his representatives and the appellant with respect to the basis of measuring the gravel bedding for payment. When the appellant first started hauling gravel in January, Glenn Dusky asked Wesley A. Brandon, the Bureau's chief inspector on the job, to give him, from the cross section book, a list of the neat line volumes for each station reach of the lateral because the upstream end of the lateral was narrower than the downstream end, and he was having difficulty in determining where most of the gravel would be needed. Brandon complied with Dusky's request but he did not tell him what the basis for payment would be. On the contrary, when Dusky did raise this question at about this time, Brandon plainly told him that, since the specifications left it to the contracting officer to choose between two alternate methods of payment, he could not make such a decision, and suggested that he contact his superior, Wayne Johnson, who was Assistant Field Engineer. Brandon also reported his conversation to Johnson but Dusky took no further action in the matter.² During the progress of the work,

screenings from the manufacture of crushed stone in connection with the highway construction, was more finely graded than the gravel from the Government pit would have been. Instead of being graded down from 1½ inches, it was graded down from ¾ of an inch. As it was otherwise suitable, however, its use was approved by the contracting officer.

² The appellant's contention, based on the testimony of Shilling and affidavits made by Dusky and Allen J. Sharp, Shilling's superintendent, that the Bureau originally intended to pay for the gravel on a truck count basis is clearly against the weight of the evidence and must be rejected. Shilling seems to have been repeating mere hearsay, or his own mis-

Brandon did keep a tally of the number of truck loads of gravel being delivered by the appellant's hauling subcontractor—Markham by name—but the inspector simply accepted the figures given him by the latter as to the number of loads of gravel delivered to the job the previous day, and the trucks delivering the gravel, which were three in number—one having a capacity of 9.77 cubic yards, and the other two of 6.02 cubic yards—were not even measured by Brandon until on or about March 11, 1957. The question of the basis of payment for the gravel bedding was not brought up by Shilling until the close of the month of March when the Bureau made a progress payment estimate that reflected a lesser quantity than he had been anticipating. Shilling then discussed the question with Ross C. Lovelace, the Construction Engineer of the Othello Construction Division of the Columbia Basin Project. As a result, Lovelace arranged a meeting at Warden on April 11 to which he invited Dusky, and the latter came alone to the meeting, which was attended also by Wayne Johnson and Brandon. Lovelace explained that payment would be made on the basis of the cross sections which had been taken, and, while Dusky appears to have grumbled about his high costs, he did not make any explicit objection to the proposed method of payment. On the contrary, when Lovelace informed Dusky that, although the amount shown by the cross sections would be the basis of payment, an additional allowance in the amount of 10 percent would be made for the subsidence in the bottom and side slopes of the lateral due to travel of the equipment over them, Dusky agreed to this 10 percent subsidence allowance.³ Nevertheless, under date of May 6, 1957, Dusky wrote a letter to the Bureau, protesting payment on the basis of cross section quantities, plus the 10 percent subsidence allowance, which he erroneously referred to in the letter as a "compaction factor."

In his findings of fact, the contracting officer determined that the appellant was entitled to payment for the gravel bedding in the amount of 1,978 cubic yards. This was made up of the actual quantity shown by the cross sections, which was 1797.9 cubic yards, plus the 10 percent allowance for subsidence in the amount of 179.8 cubic yards, the total being carried to the nearest integer. It is the position of the appellant, however, that it should have been paid on the basis of loose

taken understandings. As for the affiants, they were not, of course, subjected to cross examination, and their assertions that there was an "understanding" with reference to the basis of payment for the gravel, cannot be accepted in view of Brandon's testimony at the hearing. Moreover, Sharp who refers to "Inspectors" (in the plural) with whom the understanding is supposed to have been reached, does not even identify them. In any event, even if one of the inspectors, whether Brandon or anyone else, had entered into any such understanding, he would have lacked authority to do so, and no commitment would have resulted.

³ His agreement to the subsidence allowance is only another indication that there was no prior understanding with reference to the basis of payment for the gravel.

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truck measurement, for hauling and placing 2,638 cubic yards of gravel, which represents the amount of gravel hauled to the job, less the amount estimated to have been wasted. The difference between the figure of 2,638 cubic yards and the 1,978 cubic yards for which payment was actually made is 658 cubic yards. At the unit price of \$7.00 per cubic yard, it accounts for the additional compensation claimed in the amount of \$4,606.

The appellant concedes, as is indeed obvious, that paragraph 36(d) of the Special Conditions of the specifications gave the contracting officer a choice between two alternative methods of measuring the gravel bedding for payment. But, apparently it regards the first method based on the cross sections, as impractical, and hence concludes that payment must be made according to the second method by loose truck count without applying a compaction factor to the gravel.⁴ This position is hardly tenable.

It is true that it is not explicitly stated in paragraph 36(d) that the application of a compaction factor will be involved in both methods, and that what is stated in the second sentence of this paragraph is what payment will include rather than how the gravel shall be measured for payment. But, both this provision, as well as the provision of Paragraph 4 of the General Conditions, make it clear that the completed work was to include the placing of compacted gravel bedding, and hence that the Bureau was not engaged merely in buying so many truck loads of loose gravel. As both of these provisions are wholly consistent with each other, there is no need, as the appellant suggests, to subordinate the provisions of the General Conditions to the provision of the Special Conditions. It is apparent, moreover, that if either method of measuring the gravel for payment presupposed the measurement of the gravel in a compacted state, the other method must also presuppose this, since both, to be equitable, must produce equivalent results. Obviously the cross sections determined the outlines of an area that would be covered with gravel bedding in accordance with the requirement of the specifications, and they would, therefore, reflect the volume of the gravel in a compacted state. This being so, even if the contracting officer had selected the loose truck measure as a basis for payment, a compaction factor would also have to be applied to this measure.

The appellant advances a number of arguments to the contrary but they are not persuasive. Thus, it argues that the gravel would have to be measured in a non-compacted state because bidders would be

⁴ The gravel was subjected to compaction tests by the Bureau on March 18 and 21, 1957, and these showed that 1.254 cubic yards of gravel, loose truck measure, would be required to yield 1.00 cubic yard of compacted gravel bedding.

unable to determine the factor of compaction in advance, since the source of gravel was subject to the approval of the contracting officer, and hence would not be determined until after the contract were made. But this proves only that the contract involved elements of uncertainty or risk for the contractor, as most contracts do, and that the bidders would have to rely on their general experience. A consideration of this sort is, therefore, of very little, if any help, in interpreting the requirements of the contract.

Equally fallacious is the appellant's argument based upon differences of nomenclature to be found in the schedule and the provisions of the specifications. The fact that item 6 was denominated "Gravel bedding for concrete lining" rather than "Compacted gravel bedding for concrete lining," while item 7 was denominated "Compacted earth lining," and that the payment for item 6 was to the outlines of the areas covered with gravel bedding rather than to prescribed neat lines, as provided in paragraph 39(f) of the specifications with respect to compacted earth lining, does not demonstrate that the provision for payment of item 6 was ambiguous. There were important differences between the provisions for the performance of each of the two items which no doubt were responsible for what were differences of substance and emphasis in the language. In the case of the earth lining, the material came from borrow (item 3: Excavation from borrow), and was paid for separately, and compaction was a separate and more basic operation, which was to be performed within the specified neat lines, while in the case of the gravel bedding, it was to be furnished by the contractor without separate payment therefor, and payment was for volume of material installed; as the depth was not precisely indicated, neat lines were not involved in both sides of the gravel bedding. The Board has previously had occasion to point out that there are different ways of expressing the same thought, and differences in the use of language do not, therefore, necessarily betoken differences in meaning, unless perhaps the provisions are directly related, and the language was obviously designed to be exactly parallel.⁵

The appellant relies also on the practical construction of the payment provisions by the parties but if it has any significance it actually favors the interpretation adopted by the contracting officer. The fact that the inspectors reported the truck count tally of the gravel kept by the hauling subcontractor has no importance as a practical construction, since they reported generally all the operations under the contract, and the information was useful in connection with the preparation of progress payments, and even as a rough check on the accuracy

⁵ See *Osberg Construction Company*, 63 I.D. 180, 186 (1956).

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of the measurement based on the cross sections.⁶ If the contracting officer had determined at the beginning of the work to base payment on the truck count tally, the hauling of the gravel would certainly have been far more carefully supervised and checked. Moreover, since the contracting officer had a choice between the cross sections and the truck count tally in measuring the gravel for payment, and the choice would not have to be exercised until after the gravel had been placed, the mere keeping of a truck tally could not constitute evidence of a practical construction. Of even less significance was the measurement of the waste piles, since this was not done until after the work had been completed and was done as an accommodation for the appellant. The application of a compaction factor to the waste was, moreover, inconsistent with the appellant's own contention that the gravel was to be measured in a loose state. Similarly significant is Dusky's agreement to the 10 percent subsidence allowance when it was suggested to him. Such an agreement on his part came close, indeed, to the acceptance of payment on the basis of the cross sections.⁷

The Board must conclude that the provision for the payment of the gravel bedding was not ambiguous, and that it was wholly within the discretion of the contracting officer to base payment therefor on its volume in a compacted state, either by making use of the cross sections, or by applying a compaction factor to the volume of gravel shown by loose truck measurement.

The appellant requests further, however, that if the Board reaches this conclusion it give consideration also to the question whether the contracting officer properly determined the volume of the gravel bedding for which the appellant was to be paid. Thus it argues that in order to have obtained accurate results the cross sections should have been taken immediately prior to the placing of the gravel bedding, so that the effect of frost heave on the ground would have been minimized; that the cross sections should have been taken on a grid as close as 2 x 3 feet, in order to reflect the large number of serious irregularities which existed in the lateral, both longitudinally and

⁶ Thus, while in his findings the contracting officer based his calculation of the volume of the gravel on the cross sections, he was also able to demonstrate how closely his results conformed to the appellant's truck count tally when due allowance was made for compaction. Applying the compaction factor of 1.254 to the 1,978 cubic yards of gravel paid for, 2,480.4 cubic yards of gravel, loose truck measure, were required to install the compacted gravel bedding. Adding the measured waste in the amount of 1,040.3 cubic yards to this figure, 3,520.7 cubic yards would be the total volume of gravel hauled. As the appellant's truck tally for the gravel was 3,658.1 cubic yards, it is apparent that it was only 3.9 percent greater. Allowing for spillage during transportation and some loss during placement, there was little difference between the figures.

⁷ Shilling's testimony that when he learned of the 10 percent subsidence allowance he protested against it to various subordinates of the contracting officer does not detract from the force of its acceptance by Dusky. Not being a party to the contract, Shilling had no standing to make any protest.

transversely, and the presence of caliche in seamy formations in the upper reach of the lateral,⁸ which allegedly tended to compact excessively; that a subsidence allowance of 35 rather than 10 percent should have been made because of the soft and mushy condition of the bottom of the lateral, and the effect of the travel upon it of the appellant's heavy equipment; and, finally, that if payment is to be made on the basis of loose truck measurements, a compaction factor of 1.10 rather than 1.254 be applied to the measurements.

The Board must find that the contracting officer did not err in making his determination of the volume of gravel bedding for which payment should be made. The appellant's contentions with respect to the irregularities of the lateral, the effect of frost heave and the presence of caliche rest entirely on the testimony of Shilling but his testimony is wholly irreconcilable with the testimony on the same subjects of Lovelace and Brandon whose range of experience and opportunities for observation were at least as great. Indeed the weight of all the testimony is clearly in favor of the Government with respect to the disputed questions of fact.

The appellant's contentions are, moreover, contrary to all the inherent probabilities to be deduced from the facts of record. Generally speaking, irregularities tend to average out in the taking of a series of cross section measurements. As those in the present case were taken in a completed lateral prism, which was only to undergo rehabilitation, they would normally yield results of a high degree of accuracy. As the condition which had led to the rehabilitation of the lateral was the porous nature of the soil, it was, similarly, far less likely that it should have been affected by frost heave, especially when the lateral had drained long before the contract had been awarded, and the weather in the period immediately preceding the taking of the cross sections had not been very severe;⁹ nor was it probable that the ground would freeze further to an appreciable extent due to the severity of the winter weather following the shutdown of operations, since the gravel placed along the bottom of the lateral before then would tend to act as an insulator against frost. Moreover, test holes dug in the sides of the lateral just before work had been resumed showed no frost in the top foot of the ground. As for the effect of the weathering of the caliche when subjected to

⁸ Caliche is a hard, white alkaline substance that is so firm and hard that it is almost like solid rock. When subjected to water action, the outside surfaces tend to become chalky but not to a great extent.

⁹ Although there had been some cold weather in the months of November and December 1956, a spell of unusually warm weather had been experienced in the week preceding the days on which the cross sections were taken. Indeed, the weather could hardly have been very severe during this period if the appellant was able to continue placing blended earth lining until January 12, 1957.

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water action, apart from the fact that its extent appears to be greatly exaggerated,¹⁰ caliche was present in appreciable quantities only in the first third of the length of the lateral that received the gravel bedding, and it was precisely in this reach of the lateral that the spacing of the cross sections was far closer than the 40-foot average.¹¹

The appellant's suggestions for correcting the alleged impracticality of the contracting officer's procedure in measuring the gravel bedding for payment are in themselves not very practical. The cost of taking cross sections on a grid as close as that desired by the appellant would have been prohibitive. Another suggestion of the appellant was that it be allowed to dig holes through the completed lining in order to measure the thickness of the gravel bedding but there is nothing to show that such random probings would have produced any more reliable results than the hundreds of measurements taken in preparing the cross sections. Indeed, the record affirmatively shows that the practice of using cross sections in measuring earth work is common, and that the very same method was employed in two other instances under contemporaneous contracts for the repair of laterals that contained identical language, and that neither of the contractors challenged the use of the method. On the other hand, the record reveals two factors which may have contributed to the appellant's disappointment with the contracting officer's measurement. In tearing out with a bulldozer chunks of broken caliche hanging on the slopes of the lateral, the appellant overexcavated, and thus had to fill the overexcavated areas with gravel. By using a finer gravel than had been contemplated, the appellant increased the degree of compaction to which it would be subjected. Both factors might increase the quantities of gravel without being reflected in the cross section measurements but the appellant can hardly complain of their effects, since it was itself responsible for bringing them about.

As the burden of proof is always on the appellant to substantiate a claim, the Board would hardly be warranted in holding that the contracting officer did not exercise his best judgment, and set aside his determination as arbitrary and unreasonable. This must be especially so in a case in which he was not required to make precise determinations in measuring the gravel bedding for payment but to do so only "in the most practicable manner."

¹⁰ The caliche appears to have been mostly of a solid, chalky type which would not weather appreciably.

¹¹ The first five cross sections were taken at intervals of 5, 5, 6, 20, and 14 feet.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F.R. 9428), the findings of fact and decision of the contracting officer, denying the appellant's claim for additional compensation, is affirmed.

WILLIAM SEAGLE, *Member.*

We concur:

THEODORE H. HAAS, *Chairman.*

ARTHUR O. ALLEN, *Alternate Member.*

APPEAL OF REID CONTRACTING COMPANY, INC.

IBCA-74 *Decided December 19, 1958*

Contracts: Appeals—Contracts: Comptroller General

The fact that an appellant, who was seeking, while its appeal was pending before the Board of Contract Appeals, the settlement on the administrative level of a dispute arising from the performance of its contract for the construction of a dike across a marsh did not specifically consent that the Administrative Assistant Secretary of the Department submit the questions of law involved in the dispute to the Comptroller General for his opinion does not make the pronouncements of the Comptroller General on these questions of law any the less binding on the Board, for the power of the Department to request the Comptroller General's opinion did not depend on the consent of the appellant, and the Board is bound by the opinion of the Comptroller General on the questions of law duly determined by him. However, the opinion of the Comptroller General was rendered on an assumed state of facts, and the Board is not barred from deciding disputed questions, whether of fact or of law, that were not considered or determined by the Comptroller General.

Contracts: Specifications—Contracts: Changes and Extras—Contracts: Changed Conditions

A contract in which the quantity of hauled excavation needed to construct the core of a dike across a marsh is estimated, and which includes an "approximate quantities" provision, together with a provision that settlement of the fill below the natural marsh line in varying amounts is expected, cannot be said to contain any definite representation concerning the amount of subsidence to be expected, and hence neither a "change" nor a "changed condition" can be said to have been established merely by showing that the estimated quantities of work had been substantially increased by the contracting officer by an order denominated a "change order."

*December 19, 1958***Contracts: Changes and Extras—Contracts: Additional Compensation**

Despite the fact that a dike, which was constructed across a marsh by the contractor, was not constructed entirely in accordance with the method contemplated by the specifications, the contractor is not entitled to an equitable adjustment under the "changes" clause of the standard form of Government construction contracts, when the change in the method of construction was suggested by the contractor rather than by the contracting officer, and the contractor made the suggestion without requesting a change order, such work being voluntary work rather than a change in the technical sense. Moreover, if the method of construction adopted actually mitigated the difficulties of the contractor, arising from the continuous subsidence of the core of the dike in the marsh, any equitable adjustment would have to be made downwards rather than upwards. The contractor also could not claim that the sequence of operations contemplated by the specifications—placing fill, grading fill and placing topping material—was infeasible when it did not itself follow such sequence, and the officers of the Government did not attempt to interfere with the sequence of operations actually adopted by the contractor.

Contracts: Changed Conditions

Assuming for the sake of argument that such a negative form of misrepresentation as the entire withholding of available information by the Government may form the basis of a claim of a changed condition, a contractor engaged in constructing a dike in a marsh cannot be said to have established such a claim merely by showing that the Government had taken soundings in the marsh more than a decade and a half before the letting of the contract but failed to reveal the record of the soundings to bidders, in the absence of proof that the dike was constructed at the same location where the soundings had been taken and that the soundings would still have been useful.

Contracts: Changed Conditions

That a condition encountered by a contractor who constructed a dike across a marsh was a "changed condition" within the meaning of the second category of such conditions, which comprises unanticipated conditions, cannot be established merely by showing that the contracting officer himself characterized the amount of subsidence of the core of the dike in the marsh as "excessive."

Contracts: Suspension and Termination—Contracts: Specifications—Contracts: Performance

Whatever may be the general scope of a provision in the specifications, empowering the contracting officer to suspend the work when conditions were "unfavorable for the prosecution of the work," it is clear that it cannot be held to extend to a situation that was foreseeable in view of other provisions of the specifications, which warned the contractor of the very same conditions and extended the time of performance by reason thereof.

Contracts: Unforeseeable Causes

When a contractor has established that the weather was "unusually severe" within the meaning of the "delays-damages clause" of the standard form of Government construction contract, it is not disentitled to an extension of time merely because the days claimed are not consecutive and amount to but a small percentage of the contract performance time.

BOARD OF CONTRACT APPEALS

The Reid Contracting Company, Inc., of Woodbridge, New Jersey, has filed appeals from three successive findings of fact and decisions of the contracting officer dated, respectively, April 13 and 18, 1956, and June 21, 1957, denying the appellant's claims for additional compensation or for extensions of time for the performance of its contract with the Fish and Wildlife Service (hereinafter referred to as the Service).

The contract, which was dated November 2, 1954, was on U.S. Standard Form No. 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953) for construction contracts.

The contract, as modified by Addendum No. 1, dated September 24, 1954, provided for the construction of a dike at the Brigantine National Wildlife Refuge, Oceanville, New Jersey, in accordance with the specifications, schedule and drawings.

The dike was to consist of an earthen core approximately 13,174 feet in length, with a top width of 14 feet at elevation 9.0 feet M.S.L., and a bottom width of 48 feet at normal marsh level after settlement and was to be surfaced with muck as a protective covering. Item 1 of the Schedule provided for excavating, hauling, placing and grading approximately 240,000 cubic yards of earthen core material for the construction of the approximately 13,174 linear feet of earth dike, and Item 2 of the Schedule provided for dike topping (surfacing) of both sides of the dike to be constructed under Item 1. The bid price for Item 1 was \$0.52 per cubic yard, and for Item 2 \$0.50 per linear foot. The total estimated contract price was thus \$131,387. The bidding schedule expressly provided:

The quantities given in the following schedule are approximations for comparing bids and no claims shall be made against the Government for deficiencies therein, actual or relative. Payment will be made for the actual amount of work done and will be on the basis of the unit prices quoted.

The contractor's obligations with respect to the construction of the dike were defined in section 5 of the General Conditions of the specifications and particularly in section III of the specifications entitled "Earth fill in Embankments." The first paragraph of section 5 of the General Conditions provided:

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Except as specified in the Special Conditions, the Contractor's procedure and methods of construction may, in general, be of his own choosing provided they follow best general practice and are calculated to secure results which will satisfy the requirements of these specifications and the supervision of the work.

However, section III of the specifications contained specific provisions with respect to the placement, grading and surfacing of the hauled fill core of the dike, of which four may be regarded as of special importance. The second and fourth paragraphs of Item 1 of this section provided, as follows:

No mechanical separation, sorting, or blending of materials will be required. No requirement will be made for constructing the fill in layers and compacting, the only requirement being that after complete shrinkage and settlement have taken place the dike shall have at least the specified section at any and all points. Where dirt is moved into place by wheeled or tracked conveyances, such vehicles shall operate uniformly across the fill to give the maximum compaction possible under operating conditions.

The hauled fill core of the dike after placement shall be dressed reasonably true to lines and grades, a variation of six (6) inches in 100 feet being the maximum permissible on the slopes, and the top shall be graded to within three (3) inches of the specified grade. It is expected that settlement of the fill will occur below the natural marsh line in varying amounts. However, after settlement the section of the dike should be top width 14 feet at elevation 9.0 M.S.L. and bottom width of dike 48 feet at normal marsh level.

And, the first and second paragraphs of Item 2 of the section provided as follows:

The hauled fill core of the dike after grading shall have both side slopes topped (surfaced) with muck, peat, or natural earth as excavated from borrow pits adjacent to the dike. The resulting dike section as shown on the drawing after settlement shall have a base width not less than 72 feet at normal marsh level. A berm width of not less than 20 feet shall be left intact between toe of dike slope and edge of borrow pit on both sides of dike. The muck surfacing after settlement shall be dressed reasonably true to lines and grade with an allowable tolerance of six (6) inches in 100 feet.

To prevent loss of hauled core material after placement due to storm, the Contractor will be required to grade core fill and place muck surfacing and rough grade with dragline bucket not to exceed 1,000 feet behind outer end of operations. Any core materials lost after placement but before final payment in excess of 1,000 feet due to failure to place surfacing as above shall be replaced by the Contractor at no cost to the Government.

The General Provisions of the contract itself contained the standard "changes"¹ and "changed conditions"² clauses. In addition, pro-

¹ This was article 3, which provided for changes in the drawings and/or specifications of the contract "within the general scope thereof." If such changes occurred, an equitable adjustment in the amount due under the contract or in the time required for its performance was to be made.

² This was article 4, which provided for an equitable adjustment in the contract price or in the time of performance if in the course of the work there were discovered: "(1) subsurface or latent physical conditions at the site differing materially from those indicated

vision was made in sections 12 and 13 of the General Conditions of the specifications for the making of changes by the entry of change orders and for payment under such change orders on the basis of unit prices where applicable, or, where not, on the basis of force account if the parties could not agree in advance upon the amount of additional compensation. In the third paragraph of section 12 it was expressly provided:

The Government reserves the right, in order to utilize to maximum advantage funds available, to extend the contract either by increasing the quantities of work to be performed, or by extending the project shown in the plans, or by making additions or betterments deemed desirable by the Contracting Officer. The right similarly to limit the work under the contract by decreasing the quantities of work to be performed or by making other adjustments without materially affecting the main purpose of the project [sic]. The aforesaid contract extension or limitation shall not exceed in aggregate cost 25 percent of the amount originally contemplated in the contract. Contract payments in the event of a contract extension or limitation as aforesaid shall be made on the basis of unit prices stated in the contract, or, when the contract provides for payment on a lump sum basis, at prices determined in accordance with the provisions of Clause 3 of the General Provisions.

Under the terms of the bid and of section 4 of the Special Conditions of the specifications, the contractor was to begin work within 10 calendar days after date of receipt of notice to proceed, and was to complete the work within 400 calendar days after the date of receipt of such notice. However, it was further provided: "If satisfactory completion of the contract shall require the performance of work in greater quantities than those estimated, as set forth in the bidding schedule, the time allowed for performance shall be increased in the same ratio that the total amount of the work actually performed shall bear to the quantities estimated in the bidding schedule." Section 20 of the General Conditions of the specifications also provided: "The Engineer shall suspend the work by written order for such period or periods as are necessary because of extended unsuitable weather or for such other conditions as may be unfavorable for the prosecution of the work."

Notice to proceed was given to the contractor by registered letter date November 19, 1954, which was received by it on November 23, 1954. The contractor immediately commenced work on the project. The initial work consisted of clearing the borrow area, however, and the haul of solid fill did not commence until December 9, 1954. However, from the commencement of this operation, difficulties were experienced as a result of excessive subsidence of the core material in

in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract."

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the marsh across which the dike was being constructed. Settlement of the fill occurred below the natural marsh line to a far greater extent than had been expected. The marsh surface on either side of the dike bulged up, and large cracks appeared in the bulge. Steadily increasing amounts of core material had to be excavated and supplied.

The specifications required that the dike be constructed from the in-shore end outward into the marsh to the specified length and width; and that the muck surfacing should be applied to portions of the dike as the work progressed in such manner that there would be no unsurfaced portion that would exceed 1,000 feet. However, in a letter dated January 18, 1955, the appellant suggested that a different plan of operation be adopted, and the Service appears to have acquiesced therein. In accordance with this plan, the appellant's forces simply built across the marsh a continuous base for the dike which was only a few feet above the level of the marsh, and which was considerably wider in some places than the specification requirement, in order to permit the two-way movement of earth hauling equipment, and then proceeded to construct the core of the dike from the out-shore end to the in-shore end. While the evidence is somewhat vague, the appellant's forces appear to have graded the core material and placed the muck surfacing in one operation as they went along, but they did not dress the muck surfacing true to line and grade. It is not possible to determine from the record the appellant's motives for the adoption of the plan of operation that was actually followed. Its motive could have been either to effect economies, or to overcome difficulties which, in its opinion, were presented by the specification requirements.

When it became apparent that a far greater quantity of earthen core material than the Service had estimated would be required to complete construction of the dike,³ the contracting officer issued Change Order No. 1 under date of May 20, 1955. This increased the estimated quantity of earthen core material by 135,000 cubic yards, and the estimated price by \$70,200 or from \$131,387 to \$201,587. However, under the terms of the change order, the appellant was required to supply the additional earthen core material at the unit bid price of \$0.52 per cubic yard. This requirement was predicated upon the contracting officer's view that the change order simply effected a revision of the estimates rather than an extension or modification of the contract within the meaning of Section 12 of the General Conditions of the specifications. As the cost of performing the additional work amounted to 53.43 percent of the original estimated cost, the

³ As of February 28, 1955, for instance, although only 2,500 linear feet of the dike base, which was less than 19 percent of its designed length, was in place, approximately 45 percent of the hauled excavation had been used up.

appellant contended, however, that the additional work to the extent that it exceeded 25 percent of the original cost should be paid for on the basis of force account in accordance with the provisions of Section 13 of the General Conditions of the specifications.

Several other disputes between the contracting officer and the appellant also developed. During a storm, which occurred on June 8 and 9, 1955, 499 cubic yards of dike core material, or hauled excavation were lost because of wind and water action. During another storm, which occurred on January 10, 1956, 4,753 cubic yards of the same material were lost from the same causes.⁴ These quantities covered losses only from those portions of the dike not brought to specified grade and surfaced, and loss of material in the 1,000 feet in back of the outer end of operations was not taken into consideration. As the aggregate amount of dike core material lost as a result of the two storms was, when calculated on this basis, 5,252 cubic yards, and the rate for hauled excavation was \$0.52 a cubic yard, a deduction was made from payments to the appellant in the amount of \$2,731.04.

In a letter dated June 28, 1955, the appellant was notified that a deduction would be made as a result of the recent storms, and the appellant protested verbally against the making of any such deduction.

In a letter dated February 1, 1956, the appellant was similarly notified that a deduction would be made as a result of the January 10 storm, and the appellant protested against this action in a letter dated February 8, 1956, in which it commented: "The Specifications relating to the loss of hauled core material⁵ contemplates a method different from the procedure used by us and we feel is not applicable under the circumstances. Nonetheless, any method for the determination of loss is subject to question, and any quantity arrived at before the dike is dressed is premature." However, in a subsequent letter dated March 8, 1956, the appellant also undertook to set forth its interpretation of the storm damage provision, which was that it was intended to impose a limitation preventing the contractor from placing muck surfacing within 1,000 feet from the outer end of operations, and that the appellant was made liable for loss only if muck surfacing was actually placed in disregard of the limitation, and then only to the extent of such placement. On the other hand, the Service took the position that section 5 of the General Conditions of the specifications left the method and sequence of operations entirely to the contractor, and that if the method and sequence of operations followed

⁴ The amount was at first calculated as 5,134 cubic yards but a recalculation showed the loss to be only 4,753 cubic yards.

⁵ This is the second paragraph of item 2 of section III of the specifications, which hereinafter will be referred to as the "storm damage provision."

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by the appellant increased the hazard of the loss of core material as the result of storms, it was not relieved of liability but would have to make good the loss in accordance with the provisions of the storm damage provision. In the view of the Service, even though the contractor was not required to bring the dike progressively to the specified elevation and surface it as prescribed, the appellant was, nevertheless, responsible for the loss of materials from storms on all sections of the dike which had not been brought to specified grade level and surfaced with muck in the manner prescribed, except for the 1,000 feet at the outer end of operations.

The parties having stated their respective positions, the contracting officer issued the findings of fact and decisions of April 13, 1956, which dealt with the increase in the estimated quantities of hauled excavation, and of April 18, 1956, which dealt with the storm damage deduction. Both were in the form of letter decisions. Under date of May 10, 1956, the appellant duly filed separate appeals from each of the findings of fact and decisions of the contracting officer, and the appeals were also in the form of letters.

The appeal from the findings of fact and decision of April 13, 1956, merely reiterated the views already expressed by the appellant. However, the notice of appeal from the findings of fact and decision of April 18, 1956, went beyond the immediate issue of the storm damage controversy, and set forth the appellant's views with respect to the sequence of operations required by the contract, as follows:

Paragraph 2 of Item 1 of Section III of the Specifications, requires the Contractor to place the dike to the specified section at any and all points until complete shrinkage and settlement have taken place. This obviously means that until complete shrinkage and settlement have taken place, the determination as to the achievement of the specified section cannot be had. Prior to the complete shrinkage and settlement of the material placed, the topping of the dike cannot be performed, inasmuch as it is only after the embankment has conformed to the required dimension, and reached stability, that the topping can be placed. This is further confirmed by the first sentence in the first Paragraph of Item 2 of the said Section III. Obviously, grading cannot be accomplished until the embankment elevations have reached a stable condition. The sentence referred to requires the grading prior to the topping. In short, the sequence of construction as required by the Specifications is:

First: Placing of the fill, to required line and grade, which required line and grade must be achieved after final shrinkage and settlement have taken place,

Second: The grading of the material so placed, and

Lastly: The placing of the topping material.

When all of the aforesaid language is read in conjunction with Paragraph 2 of Item 2 of Section III, the said Paragraph 2, despite its apparent ambiguity, only applies to a situation where the final line and grade has been achieved after complete shrinkage and settlement has taken place. Thus, the liability upon Contractor is specifically limited to a situation where the finished line

and grade has been so accomplished. The requirement of muck surfacing for a maximum of 1,000 feet behind the outer end of operations only takes effect when the finished grades have been accomplished, all as aforesaid. Apparently, the 1,000 feet limitation was included in the Contract so as to assure the Government of the fact that final shrinkage and settlement had taken place in the area, and would thus prevent Contractor from muck surfacing an area that had not been properly prepared. It is to be specifically noted that in the areas where the alleged storm damage occurred and for which liability is attempted to be imposed upon Contractor, the finished line and grade had not been reached.

The first paragraph of Section 5 of the General Conditions set forth on Page 3 of the said decision is expressly made subject to the Special Conditions and as stated above, such Special Conditions required a specific sequence of operations and also specifically limited the responsibility of Contractor as aforesaid, for loss due to storm.

By May 4, 1956, the appellant considered that it had placed 356,305 cubic yards of hauled excavation, which it regarded as sufficient to bring the core of the dike to the required elevation, even allowing for some further settlement, and the question arose whether the Service would accept the dike as completed, and as of what date. Under date of June 11, 1956, the Regional Engineer of the Service, Dudley W. Crawford, who had been designated as the authorized representative of the contracting officer, wrote a letter to the appellant in which he called its attention to the direct dependency of the completion time upon the quantity of hauled excavation, and the consequent impracticability of determining the completion date accurately until final cross sections of the borrow areas had been taken and the final quantity had been computed. He also noted that he had estimated that as of May 31, 1956, 348,711 cubic yards of hauled excavation had been placed, which would mean that 581 calendar days would be allowed for the performance of the contract, making the provisional completion date June 26, 1956. He also closed the letter with the following statement:

Also, *with the approaching completion of the contract* your attention is called to Section 30 of the General Provisions,⁶ requiring at least ten days notice prior to anticipated date of completion of all contract work. [Italics supplied.]

In response to this letter, the appellant advised the Regional Engineer by telephone on June 13 (and confirmed the notification by telegram on June 26) that it had "substantially completed all items of work" under the contract. This notification elicited a letter from the office of the Regional Engineer under date of July 20 in which the contention of the appellant that substantial completion of the work had been achieved was disputed. It was noted that the top elevation of the dike varied considerably, and over large areas was

⁶ The reference should have been to section 30' of the General Conditions of the specifications.

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below the 3" tolerance for the specified grade; that the muck on the upper half of the dike slopes, where the muck had slumped excessively, had to be pulled up, and the muck surfacing dressed reasonably true to line and grade; and that the clearing of the borrow area had to be completed. In addition, the appellant was warned of the possibility of the accrual of liquidated damages, if equipment in addition to the one scraper and dozer that had been on the job during the past week were not provided. Moreover, under date of September 19, a certified letter, signed by D. Wood, Jr., the Administrative Officer of the region, was sent to the appellant, commenting on the unsatisfactory prosecution of the work, and warning it not only of the possibility of liquidated damages but also of termination of its right to proceed with the work under the contract. Under date of October 5, 1956, the appellant wrote to the office of the Regional Engineer, stating that elevations taken on the job site on October 1, 1956 showed that the dike was up to or above the minimum required grade throughout its length, and suggested that if the Service would concede that the dike had achieved complete stability, it would proceed, under protest, "to regrade the muck."

Throughout the period of the construction of the dike, the appellant was contending that its construction in accordance with specification requirements was infeasible. Under date of January 11, 1955, the Regional Director of the Service called the attention of the appellant to what he characterized as "gross deviations" from contract requirements. He complained that the core of the dike was not being constructed within specified limits. "The base of 'Solid Fill' in some instances," he stated, "is 56' wide and the top 44' or more in width. The design requires a 48' bottom and 14' top width." In its reply to this letter under date of January 18, 1955, the appellant conceded only that "in one short area is the base width in excess of the 48' bottom width as called for by the design drawing,"^{*} but added: "You are aware that the design of the dike holds from the natural marsh line upward. You are further aware that settlement of the fill is occurring below the natural marsh line in a far greater amount than is indicated in the design section. You are also aware that in the placing of the hauled fill core of the dike, the surrounding natural marsh line is not a predictable, nor a stable line."

Subsequently, after the issue of the completion of the work had arisen, the appellant's complaints of the infeasibility of the contract

^{*} Judging from a memorandum dated February 2, 1955, from D. L. Buck, the General Engineer, to the Regional Engineer this area would seem to have been from Station 0+00 through Station 10+00, but it also appears from the memorandum that the top of the dike was then only approximately 2 feet above the original marsh surface.

requirements became more insistent. In a letter dated August 18, 1956 to the Director of the Service, the appellant, in attempting to summarize the various controversies that had arisen between the parties, returned to the question discussed in the letters of January 11 and 18, 1955, and contended that the "directive" contained in the January 11 letter (which, it stated, had been strictly enforced) had prevented it from achieving "a prompt and more positive settlement of the fill material" by building a heavy overburden. It also argued that the specification limits as to height and width applied only to the completed work and should not have been enforced during construction, and that the directive had been "contradictory inasmuch as the specifications state: 'No requirement will be made for constructing the fill in layers * * *'"

In a letter dated September 10, 1956 to the Administrative Officer of the Region, the appellant reiterated that it had "consistently and repeatedly" taken the position that the dike could not be constructed in accordance with specifications requirements, and declared that "the Department throughout the history of the job, has taken the arbitrary, unreasonable and unjustified position of insisting that the Contract Plans and Specifications be followed, with the result that despite our diligent efforts to abide by these provisions, *the dike is not yet completed*, and obviously will never be completed under the prevailing requirements of the Plans and Specifications." In replying under date of September 28, 1956 to the Administrative Officer's letter of September 19, the appellant not only again commented on the infeasibility of constructing the dike in accordance with the specifications but also added that, in examining the files in the case, it had discovered that "there is a very distinct possibility of misrepresentation on the part of the Department * * *."

The record shows that the view that the construction of the dike in accordance with specification requirements was infeasible was shared by D. Wood, Jr., the Administrative Officer of the Region. In commenting in a memorandum to the Director of the Service dated October 10, 1956, on the proposal made by the appellant in its letter of October 5, 1956, to the office of the Regional Engineer, he took the position that it would not be possible under the terms of the contract to give the commitment which the appellant had requested. After noting the appellant's claim that "the completion of the dike under existing specifications of the contract is an impossibility for the reason that it is not possible to bring the entire dike to specified grade and to keep it there until the topping can be placed, in accordance with the specifications of the contract," he commented:

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In regard to the contractor's contention that the completion of the contract under existing specifications is impossible, I feel that it is only fair to point out that his claim is substantially consistent with my own views in the matter, dating from the time that the specifications were first written prior to the issuance of the invitation to bid. I stated from the beginning that it was my opinion that no contractor could build this dike under the proposed specifications and bring it to grade and keep it to grade long enough to place the topping as required, but that it would be necessary to bring the dike to grade not once but several times and place the topping not once but several times. I was overruled in the matter by the Branch of Engineers and others in authority in your office.

To remedy the situation, he suggested:

I believe that the interests of the Government can best be served in this matter by the issuance of a change order eliminating further placement of muck and providing for acceptance of the dike when the core has been brought to an elevation to afford reasonable protection until the Government can take over and place muck topping by force account. Contract performance time should be extended to cover such time as is reasonably necessary to permit the contractor to bring the core to the elevation deemed necessary. Payment for the excavated material should be at the rate prescribed in the contract. Settlement for muck topping heretofore placed by the contractor should be made by negotiation.

It is apparent that the controversy between the appellant and the Service had developed somewhat beyond the scope of the issues involved in the pending appeals. There were, moreover, other developments that prevented the Board from deciding even these. Upon the request of the appellant, the Board held on June 29, 1956 an informal conference^{*} which was attended by representatives of the appellant and the Service and at which the issues involved in the pending appeals were discussed. However, subsequent to this conference, the appellant made efforts to secure an adjustment of the dispute on the administrative level, and finally in a memorandum dated October 25, 1956, Department Counsel requested that the Board return the appeal file, so that the issues involved in the appeals could be considered administratively. The Board acceded to this request, and suspended further proceedings until such time as the parties should request that the appeals be restored to the Board's calendar.

As a result of this administrative consideration, the Administrative Assistant Secretary of the Department decided to seek the opinion of the Comptroller General on various questions arising in connection with the appeals. The request for the Comptroller General's opinion was made by him in a letter dated November 23, 1956. In this letter, the provisions of the contract documents were

^{*} Provision for such conferences are made in section 4.9 of the Board's rules.

summarized and the circumstances leading to the entry of Change Order No. 1, and the deductions for the storm damage were outlined, the insufficiency of the estimated quantity of hauled excavation being attributed to the "excessive subsidence of the earthen core material in the marsh across which the dike was being constructed."

The Comptroller General, in an opinion dated December 12, 1956 (B-129877) held that in view of the "approximate quantities" provision, and the statement in the fourth paragraph of item I of section III of the specifications that settlement of the fill below the natural marsh level in varying amounts could be expected, the Government could not be deemed to have represented that the dike could be completed with the estimated amount of material. As for the limitation contained in the third paragraph of Section III of the General Conditions of the specifications, he held that it was applicable to extensions made "in order to utilize to maximum advantage funds available." Thus, he said:

* * * The language of the clause is general, and evidently was intended to embrace extensions of any contract in which it might be incorporated, whether the subject matter of the contract be work and labor or the construction of a specific project. We do not believe that the general reference there made to increases in the quantity of work can be read as limiting or qualifying the specific provision that payment for the actual amount of work done in the accomplishment of the project defined in the specifications and drawings should be on the basis of the unit prices stated. As indicated above, the contract was not merely to supply 240,000 cubic yards of earthen core, plus surfacing, at a cost of \$131,387, but to construct a dike for a price of \$0.52 per cubic yard of excavated material used. It follows that Change Order No. 1 did not constitute an increase in the quantity of work to be performed under the contract, or an extension of the project, or a desirable addition or betterment, to which the 25 percent limitation set out in Section 13^a is directed. * * *

Having upheld the validity of Change Order No. 1, which required the appellant to perform the additional work entirely at the unit prices stated in the schedule, the Comptroller General also held that, notwithstanding clause 3 of the General Provisions of the contract—the "changes" clause—which provided for an "equitable adjustment" in case the quantity of work was increased, by reason of a change in the specifications or drawings, the appellant was entitled to an extension of time for the performance of the additional work only to the proportionate extent provided for under the terms of the bid and Section 4 of the Special Conditions of the specifications. "Nothing appears in the present record," he observed, "which would support a conclusion that a pro rata extension based on the increased quantity of excavation referred to in Change Order 1 would not be

^a The reference to section 13 is doubtless a typographical error. Section 12 is, of course, the applicable provision.

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equitable." However, he also added: "The determination of an 'equitable adjustment' is primarily a question of fact to be determined by the contracting officer * * * and the contractor is entitled to appropriate findings thereon. * * * However, in the absence of evidence that a pro rata extension of the contract completion time would not be equitable, it is our opinion that there would be no legal justification for a greater extension."

In addition, the Comptroller General held that the increase in the quantities of work over and above the original estimate could not be considered as evidence of a "changed condition" within the meaning of Clause 4 of the General Provisions of the contract. He noted, to be sure, that the "subsidence of the core material exceeded the engineer's estimate." But, he pointed out:

That subsidence in varying amounts was anticipated is distinctly set out in Section III of the Specifications and, in the absence of a definite representation in the contract as to the amount of subsidence, it is our opinion that the condition encountered—which apparently had no effect on the character or method of work required—did not constitute a changed condition within the meaning of Section 4 of the General Provisions. *The Arundel Corporation v. United States*, 103 Ct. Cl. 688; *M. A. Breyman Dredging Co. v. United States*, 106 *id.* 367; 10 Comp. Gen. 557; 19 *id.* 1007. [Italics supplied.]

As for the question of the responsibility of the appellant for the storm damage, while the Comptroller General agreed with the contracting officer's rather than the appellant's construction of the storm damage provision of the specifications, he, nevertheless, held that the appellant was not responsible because information received informally from the Government indicated that it had waived the provision. Thus, he said:

It is understood from informal advice from a member of your staff that it was originally contemplated that construction of the dike should commence at the shoreline, that the core should be completed to specified height and width as construction progressed into the marsh, and that surfacing should be applied to the completed core as the work progressed so that the unsurfaced portion would not exceed 1,000 feet. This appears to be the natural interpretation of the quoted provision. Under such method of construction it is clear that the contractor was obligated by the provision of the Specification in question to replace any storm damage to the completed but unsurfaced core which occurred more than 1,000 feet behind the point at which he was currently constructing the core. However, due to the large amount of subsidence, the contractor was authorized, apparently informally, to construct a partially completed core, without regard to height and width, to the full length of the dike and to complete the core and apply the surfacing from the outer end toward the shore. Under this method of construction a literal application of the specification provision would result in holding him responsible for any storm damage which might occur in the entire 13,174 feet of uncompleted core. Since the contractor would have incurred no liability for damage to the uncompleted

core if he had been required to construct the core in the manner originally contemplated it is our opinion—on the basis of this information—that the apparent waiver by the Government of the specification requirement as to surfacing must be construed as a waiver also of the contractor's obligation to replace lost material, and that the contractor may not now be held liable for storm damage to the uncompleted core which may be attributable to the permitted change in methods. See *District of Columbia v. Camden Iron Works*, 181 U.S. 453; *Geo. A. Fuller Co. v. B. P. Young Co.*, 126 F. 343; 12 Am. Jur. 920-921.

In conformity with the Comptroller General's opinion that the appellant should not be held responsible for the storm damage, the contracting officer wrote a letter, under date of December 27, 1956, to the appellant with which he transmitted a copy of the opinion and confessed error in rendering his decision of April 18, 1956. He also informed the appellant that the quantities of hauled excavation theretofore deducted by reason of the storm damage in computing earnings under the contract would be allowed and that the appellant would be given full credit for such quantities at the contract unit price for hauled excavation. The appeal from the findings of fact and decision of April 18, 1956 has, therefore, become moot as a separate issue, and requires no further consideration as such by the Board.

In the letter of December 27, 1956, the contracting officer also suggested to the appellant the holding of an informal conference to discuss three alternatives in dealing with the existing situation, namely (1) resumption of work by the appellant in order to complete the contract; (2) termination of the contract by mutual agreement of the parties, in which case adjustment would be made for the uncompleted work under the contract; and (3) termination of the contract for default in accordance with clause 5(a) of the General Provisions of the contract. The suggested conference was subsequently held on March 1, 1957 in the law offices of counsel for the appellant in New York City. In a letter to the appellant dated March 12, 1957, in which the discussion at the conference was summarized, the contracting officer indicated that it had been agreed that the second alternative seemed the most desirable and suggested that the appellant consider a proposed form of termination agreement which was enclosed. He also suggested that the appellant formulate in writing its ideas on an extension of time for performance of the contract, so that its prior requests could be given consideration by him.

Consequently, under date of May 10, 1957, the appellant addressed a letter to the contracting officer on this subject in which it requested an extension of time of at least 72 calendar days for the performance of the contract, which, apart from 12 days that were claimed because of "unusually severe weather," was based on the contention that "there

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was no correlation between the quantities of hauled excavation placed in the dike and the time we were unforeseeably compelled to consume," and that the Government had no right, therefore, to impose any liquidated damages.

In his findings of fact and decision of June 21, 1957, the contracting officer stated that they would cover performance of the work under the contract "from the date of commencement¹⁰ to and including October 5, 1956."¹¹ He found that as of the latter date

the contractor had completed all work under the aforesaid contract, except for finished grading of the dike core and surfacing and incidental clean-up work. The dike topping (surfacing) item was estimated as 40% complete. Whether that physical state of completion of the contract applies to dates subsequent to October 5, 1956 is not within the scope of those findings.

As the contract performance period extended between the dates of November 23, 1954, and October 5, 1956, which was a period of 682 calendar days, and the contract performance time allowable under the terms of the contract was only 610 calendar days—the 400 calendar days specifically allowed by the contract, plus an allowance of 210 calendar days for the quantities of excavation in excess of the original estimate—¹² the contracting officer found that the appellant was already 72 calendar days late in the performance of the contract, and assessed liquidated damages against it at the specified rate of \$300 a calendar day in the amount of \$21,600. He expressly denied any extension of time by reason of what he characterized as "excessive sinkage" of the dike either under clause 3 of the contract—the "changes" clause or under clause 5—the "delays-damages" clause. He also denied the extension of time of 12 days claimed by reason of "unusually severe weather," apparently on the grounds that in only one instance were as much as two consecutive days involved, and that the number of days claimed amounted to less than 2% of the total contract performance time of 610 days.

Shortly after the findings of fact and decision of June 21 were issued—namely, on July 15, 1957—the appellant executed the termination agreement which had been executed on behalf of the Government on July 8, 1957, and which the parties had been negotiating for some time. Under the terms of the agreement, the parties reserved

¹⁰ This date was November 23, 1954, when the appellant acknowledged receipt of notice to proceed.

¹¹ "Any cause for action or decision under the contract subsequent to October 5, 1956," the contracting officer added, "will be for handling separate and apart from these findings."

¹² In the calculations of the contracting officer, it was assumed that the estimated quantity of 240,000 cubic yards exceeded the actual quantity of 365,839 cubic yards by 52.42 percent, and that the appellant was entitled, therefore, to an extension of time based on that percentage of the 400 calendar days specifically allowed by the contract, or 210 calendar days if the result is carried to the nearest integer.

all their respective rights and reiterated their respective contentions in the "whereas" clause¹³ but agreed that the appellant should be relieved of any responsibility for further performance of the work under the contract for the construction of the Brigantine dike, and that settlement under the contract should be made on the basis of "work quantities consisting of 365,839 cu. yds. of hauled excavation and 13,174 lin. ft. of dike topping (surfacing) less the stipulated and agreed amount of \$4,500 which the parties have agreed upon as fixing and liquidating the cost of such work as both Government and Contractor agree remained to be done under the contract." In addition to the termination agreement, the appellant also executed a final payment voucher.

Shortly after the execution of these documents—namely, under date of July 19, 1957, the appellant filed an appeal from the findings of fact and decision of June 21, contending that no liquidated damages at all should have been imposed. In addition to the arguments made in its letter of May 10, the appellant advanced two others in its notice of appeal and brief in support thereof. The first was that long prior to the expiration of the contract time it had "substantially completed" the work under the contract and "the remaining work was necessarily delayed without fault on the part of Contractor because of the isolated subsidences * * * ." The second was that when it appeared that the dike could not successfully be maintained at the elevation to which it had been brought but that subsidences at isolated locations would continue, the contracting officer should have entered a suspension order under section 20 of the General Conditions of the specifications which authorized temporary suspensions of the work when conditions were unfavorable for its prosecution.

Shortly after the opinion of the Comptroller General had been rendered—namely, on January 7, 1957—counsel for the appellant had filed a request with the Board that the then pending appeals be restored to its calendar but further developments in the case, including the issuance of the additional findings by the contracting officer had prevented action on the request. However, under date of July 22, 1957, Department Counsel filed a motion with the Board to dismiss

¹³ One of the contentions of the appellant recorded in the seventh "whereas" clause of the agreement was to the effect that the Government prior to the making of the Brigantine contract had had information concerning conditions "differing materially from those on which Contractor relied in entering into the contract * * * ." This contention was based no doubt on statements made in various intra-Service memoranda such as those dated March 9 and April 21, 1955, which had come to the attention of the appellant. These indicated that soundings had been taken in the marsh in 1940 when drawings for the dike had first been prepared. It should be noted also that the dike constructed by the appellant was known as the North Dike but that at the time the contract for it was let, the Service was itself constructing two other dikes, known as the South dike and the Cross dike, and that the work was then nearing completion. Conceivably, this work by the Service itself could constitute a source of information concerning possible adverse conditions.

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"the appeal of Reid Construction Company, Inc." (sic)¹⁴ on the ground that, since the Comptroller General had determined the matters in issue in his decision of December 12, 1956, the Board was without authority to review his decision. Under date of July 25, 1957, counsel for the appellant filed a document opposing the granting of the motion on the ground that, since it had never consented that the matters involved in the appeal be submitted to the Comptroller General, it was entitled to a decision by the Board with respect to these matters for which it had bargained when it executed the contract with the Government.

So far as the Board can ascertain from the written record, the appellant is correct in maintaining that it never specifically consented that the questions involved in its appeal be submitted to the Comptroller General. It did, however, seek consideration of its claims on the administrative level, and it could hardly be regarded as surprising, in view of the difficulty of the questions involved, that the opinion of the Comptroller General should be sought when they were considered administratively. In any event, it is wholly immaterial that the appellant did not give its consent to the taking of this step, either expressly or impliedly. The Administrative Assistant Secretary of the Department did not need such consent. It was wholly within his discretion whether he should request the opinion of the Comptroller General, and, to the extent that such an opinion could dispose of issues involved in the appeals, the Board is no less bound by it because the appellant did not specifically request that it be rendered.

On the other hand, the Board does not agree with the view of Department Counsel that the opinion of the Comptroller General disposed of all the issues involved in the appeal from the findings of fact and decision of April 13, 1956. The Comptroller General purported to do no more than rule upon the specific questions of law which had been presented to him by the Administrative Assistant Secretary. His rulings on these matters are binding on the Board.¹⁵

So far as disputed questions of fact are concerned, the appellant is correct in maintaining that under the "disputes" clause of the contract, a contractor has the right to have such questions determined by

¹⁴ Presumably, this refers to the appeal of May 10, 1956 from the contracting officer's findings of fact and decision of April 13, 1956, for as has already been pointed out the issues involved in the appeal from the findings of fact and decision of April 18, 1956, had in themselves become moot.

¹⁵ *Gila Construction Company, Inc.*, 63 I.D. 378 (1956); *Economy Pumps, Inc., Division of C. H. Wheeler Manufacturing Co.*, IBCA-94 (February 13, 1957), 57-1 BCA Par. 1173; *DeLong Engineering & Construction Co.*, ASBCA No. 3396 (September 28, 1956), 56-2 BCA Par. 1110; *Gainesville Scrap Iron & Metal Co.*, ASBCA No. 3460, May 28, 1957, 57-1 BCA Par. 1274; *Resolute Paper Products Corp.*, ASBCA No. 4825 (August 30, 1957), 57-2 BCA Par. 1414.

the contracting officer, subject to a right of appeal to the Board.¹⁶ In any event, the Comptroller General simply assumed them to be as they were set forth in the Administrative Assistant Secretary's letter of November 23, 1956, as supplemented by the oral information subsequently conveyed to him with respect to the administration of the storm damage provision. These were in turn based on the contracting officer's findings of fact of April 13 and 18, 1956 but, although the appellant had taken appeals from these findings, they had not yet been reviewed by the Board. Moreover, it is clear from the record that even if the Comptroller General had been disposed to undertake an independent determination of the facts, it would not have been possible for him to do so, since only the contract documents and Change Order No. 1 were submitted to him with the request for his opinion.¹⁷ He rendered his opinion, therefore, on an assumed state of facts, which had not, however, been accepted by the appellant. While it was stated in the letter of submission that disputes between the contracting officer and the appellant were pending, it was not stated that the latter had filed appeals from the former's findings of fact.

As for questions of law, the Board accepts, and indeed agrees with, what it believes to be the essence of the Comptroller General's opinion on the main question of interpretation submitted to him, namely the opinion that the contract itself did not contain any definite representation as to the amount of subsidence that could be expected and that neither a "change" nor a "changed condition" could be established merely by showing that Change Order No. 1 had increased the estimates of the quantities of work, even though this increase was very substantial. However, this was a pronouncement on a question of law that was not necessarily dispositive of all the issues in dispute between the parties. The Comptroller General himself recognized apparently that despite the lack of any definite representation concerning the amount of subsidence a different result might have to be reached if it had an effect "on the character or method of work required." Actually, he did not undertake to determine whether a "change" within the meaning of clause 3 of the General Provisions of the contract had occurred, other than that the increase in the quantity of hauled excavation was not in itself a change. Likewise, while he did express an opinion on the question whether "changed condi-

¹⁶ *Karno-Smith Co. v. United States*, 84 Ct. Cl. 110, 124 (1936); *Phoenix Bridge Co. v. United States*, 85 Ct. Cl. 603, 629 (1937); *H. W. Zweig Co. v. United States*, 92 Ct. Cl. 472, 482 (1941); *Hirsch v. United States*, 94 Ct. Cl. 602, 634 (1941); *Livingston v. United States*, 101 Ct. Cl. 625, 638-39 (1944); *Pacific Grape Products Co.*, ASBCA No. 3683 (August 9, 1957), 57-2 BCA Par. 1392.

¹⁷ Information to this effect has been furnished to the Board by the contracting officer in a memorandum dated October 17, 1958.

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tions" within the meaning of clause 4 of the General Provisions had been encountered, he did not attempt to exhaust all the possibilities under that clause. The "changed conditions" clause provides for relief in case of the discovery of two different categories of changed conditions. The first comprises misrepresented conditions, while the second comprises unexpected conditions. The Comptroller General seems to have limited himself to considering whether a changed condition in the first category could be said to have been encountered, for he speaks in terms of misrepresentation, and makes no reference to any of the criteria that govern the recognition of changed conditions in the second category. Thus, whether in other respects than those considered by him the appellant encountered conditions that differed materially from those indicated in the specifications, or that could be said to be unexpected—these would be questions which would still be open for determination by the Board.

Despite the fuller record of the performance of the contract, which is contained in the appeal file before the Board,¹⁸ it is unable to find any satisfactory evidence of changes in the specifications that would clearly and indubitably entitle the appellant to an equitable adjustment in its favor.

To be sure, the contracting officer was in error in the position taken by him in his decision of April 19, 1956, that under section 5 of the General Conditions of the specifications the method of constructing the dike and the sequence of operations in its construction were left entirely to the judgment of the appellant. This was true only to the extent that it was not otherwise provided, and section III of the specifications did contain a considerable number of provisions which limited the appellant's freedom of action, and with which it necessarily had to comply.

Thus, as the Comptroller General held, the dike was to have been constructed in sections, commencing at the shore line, the core of each section being completed to the specified height and width, and the surfacing being placed on it as construction progressed. However, this sectional scheme was abandoned in favor of constructing a partially completed core for the full length of the dike, with the remaining work being done from the outer end toward the shore. The Comptroller General assumed that this change was authorized "due to the large amount of subsidence," and based his waiver of the storm damage provision on this authorization. Certainly the contracting officer acquiesced in the altered mode of operation. But, in

¹⁸ However, it should be noted that the appellant has not requested a hearing for the purpose of taking testimony. It has, on the contrary, requested that the appeal be decided on the written record.

view of the fact that the record before the Board shows that it was suggested by the appellant rather than by the contracting officer or any of his authorized representatives—a detail of which the Comptroller General may not have been aware—and that the appellant made the suggestion without requesting a change order, it must be regarded as voluntary work rather than as a “change” within the meaning of clause 3 of the General Provisions of the contract. The Board has repeatedly held that a contractor who undertakes voluntary work is not entitled to additional compensation. Moreover, even if it be assumed that the abandonment of the sectional scheme was a change in the technical sense, it is not possible to determine from the record whether the degree of subsidence would have been less if the requirements of the specifications had been strictly followed. It may well be that the mode of operation actually adopted by the appellant mitigated its difficulties, and, if such were the case, the equitable adjustment that would have to be made would be downwards rather than upwards.

The appellant's contention that it was infeasible to construct the dike in accordance with the provisions of the specifications seems to be based on the assumption that there was another change, namely that the sequence of operations contemplated by the specifications—placing the fill, grading the fill, and placing the topping material—could not be followed and, therefore, had to be altered. Possibly there is some degree of ambiguity in the specifications, so far as the sequence of operations is concerned. While there is nothing in any of the provisions of item 1 of section III of the specifications that would seem to require that the contractor defer the placement of topping entirely until the dike had achieved final settlement, there is some force in the appellant's argument that the first sentence of the first paragraph of item 2 of the same section of the specifications seems to imply the contrary, certainly if the term “grading” in that sentence is construed to mean final rather than rough grading. The Board is aware, of course, of the rule that an ambiguity in the specifications must be resolved against the Government. But there would seem to be no sound basis for applying it in a case in which the contractor in the actual performance of the work does not appear to have acted in accordance with the interpretation, and demanded a change order to compensate for the extra work that would have been involved. Since the appellant on its own initiative seems to have graded the core material and placed the topping material in one operation, it gave a practical construction to the requirements of the specifications quite at variance with the ideal scheme which, according to its present contentions, should have been followed. Moreover,

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the record seems to indicate that at no time did the officers of the Service attempt to interfere with the appellant's topping operations, and compel it either to defer or not to defer them until after the dike had achieved final settlement.¹⁹ Indeed, in view of their belief that the sequence of operations was entirely for the contractor to determine, they would hardly have taken such action.

This same belief also adds to the Board's doubt that they attempted to interfere with the appellant's operations by preventing it from overbuilding in its construction of the dike. Clearly, there was nothing in the specifications that would have prohibited the appellant from building the dike to a greater width or height than the specification requirements, so long as after shrinkage and settlement, the dike met these requirements and, conceivably, such overbuilding might have been conducive to achieving its stability. So far as overbuilding the dike in height is concerned, there is absolutely no indication in the record that the appellant ever encountered any interference in this respect. As for building the dike to a greater width, the evidence is inconclusive.²⁰ In any event, while it is conceivable that overbuilding might have had a beneficial effect, there is actually no independent proof in the record that this would have been necessarily so, and it is even doubtful that the Board would have jurisdiction to entertain a claim based on the prohibition of overbuilding, for such acts of interference with the performance of the contract would seem to constitute a claim for unliquidated damages rather than a claim for additional compensation by reason of changes.

As for the possibility that the appellant encountered changed conditions in other respects than those considered by the Comptroller General, the record is even more inconclusive than it is with respect to the question of changes.

The appellant's contention that the Government withheld information that was in its possession at the time the contract was made is not substantiated by anything in the appeal file before the Board, except the appellant's own assertions, which, of course, are not sufficient proof. The mere fact that soundings had been taken in the

¹⁹ For example, Donald L. Buck, when Acting Regional Engineer addressed a memorandum dated October 9, 1956 to the Regional Director in which he stated: "We have never stopped the contractor in placing the muck topping, as we also have not stopped him in this instance. Muck topping from cross dike to the uplands has been adequate in quantity; the contractor, however, has never 'dressed to final grade' this muck, etc., on this or any other section of dike."

²⁰ The letter of January 11, 1955 from the Regional Director of the Service to the appellant is evidence that some attempt was made to restrain it from overbuilding, but there is other evidence that this amounted to no more than telling the appellant that he would not be paid for material which remained outside the design lines. This is indicated by one of Buck's memoranda to the Regional Engineer—this one dated February 2, 1955, which was written shortly after the January 11 letter.

marsh in 1940 does not establish that the information so obtained would have been of use to the appellant in 1955. Indeed, there is not even a showing that the dike constructed by the appellant was at the location where the soundings had been taken. Even if the proof of misrepresentation were otherwise satisfactory, it would be a difficult question to determine, moreover, whether the Board has jurisdiction to grant relief under the first category of the "changed conditions" clause in the case of such a negative form of misrepresentation as the entire withholding of available information by the Government.²¹

As for a changed condition in the second category, it would be strange, indeed, if the Board, in the absence of a hearing for the purpose of taking testimony, could find adequate proof in the record of the encountering of such a condition. The burden of proof is heavy in second-category cases, for the contractor must establish that the condition encountered was not only unexpected to him but also that it would generally be recognized as materially different from those "ordinarily encountered and generally recognized as inhering in the work," and this element of general recognition can be established successfully, as a rule, only by expert testimony.

Now, to be sure, the contracting officer's own characterization of the degree of subsidence of the core of the dike as "excessive" seems to have something of an aura of a second-category changed condition, for it seems to imply that the degree of subsidence exceeded even his own estimate and, thus, was unexpected, at least to him. The contracting officer's characterization would have considerable weight in a case in which the specifications had been strictly followed in the course of construction, and there was no evidence of any factors for which the contractor was responsible and which might account for the inadequacy of the estimates. In the present case, however, the dike was constructed in a fashion which was materially different from that required by the specifications and which conceivably could have affected the estimates. Moreover, that unfavorable conditions would be encountered could have been revealed by circumstances which might have been discovered by the appellant in the course of a careful site investigation, such as tide marks on the grass banks of the marsh, or sloughing of the dikes that had already been constructed by the Service in the marsh. A contractor who asserts a changed condition in the

²¹ There appears to be only one case in which such relief has been granted, namely in *Blackwell t/a Blackwell Engineering and Construction Company*, War Department BCA No. 370 (May 3, 1944), 2 CCF 713, a case in which the contractor in excavating trenches encountered subsurface utilities not shown on the plans, although the Government had been aware of their existence. However, in *Anthony M. Meyerstein, Inc.*, Eng. C & A Board No. 47 (June 21, 1948), and *Ivy H. Smith Company*, Eng. C & A Board No. 994 (July 23, 1957), it seems to be implied that claims based on misrepresentation by silence are claims for unliquidated damages.

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second category is always charged with the duty of making a reasonably thorough site examination but the record fails to disclose whether such an examination was in fact made by the appellant.

It is the conclusion of the Board that the evidence in the record is insufficient to establish that the appellant encountered a changed condition either in the first or in the second category.

There remains for consideration the question whether the liquidated damages in the amount of \$21,600 were properly assessed against the appellant. It contends that no liquidated damages at all should have been assessed because the work was substantially completed long before July 25, 1956, the date on which liquidated damages began to run. The record shows clearly that the work had not been substantially completed by this date, notwithstanding the appellant's assertions in its correspondence with the officers of the Service that it had been substantially completed. Although Crawford referred in his letter of June 11, 1956 to "the approaching completion of the contract," this in itself was only a statement of an expectation that the dike would soon be completed rather than a statement that it was then substantially complete.²² The dike was certainly much closer to completion by October 5, 1956,²³ the effective date of the termination agreement and also the date when liquidated damages ceased to run. In view of the condition of the dike at this time as shown by the facts of record, as well as the inclusion in the termination agreement by the parties themselves of the recital that it would require an expenditure of \$4,500 to complete the work remaining to be done,²⁴ the Board would not be justified, however, in finding that the work had been substantially completed as of any date that would affect the assessment of liquidated damages. Indeed, when the appellant argues that the work had been substantially completed before liquidated damages began to run, it can hardly mean it literally. The argument is really only another form of its contention that the completion of the work in accordance with the strict requirements of the specifications was infeasible.

There is no more merit in the appellant's additional contention that the contracting officer should have exercised his authority under Section 20 of the General Conditions of the specifications to suspend the

²² The record indicates that on July 17 and 18, 1956, the top of the dike was at many places below the prescribed elevation by substantially more than the allowable tolerance of 3 inches.

²³ Although most of the remaining low spots of the dike appear to have been filled in by October 5, there were still numerous spots on the slopes where the surfacing was deficient due to sloughing, and the final grading had not yet been done.

²⁴ Actually, it cost considerably more than this to complete the work. In a memorandum to the Board dated October 21, 1958, the contracting officer informed the Board that it had cost approximately \$7,500 to complete the contract work.

work because "the scattered and isolated subsidences of the dike" were "unfavorable for the prosecution of the work" within the meaning of that provision. Whatever may be the general scope of Section 20, it is clear that it cannot be held to extend to a situation which was foreseeable in view of some other provision of the specifications. As the period for the performance of the contract was predicated upon settlement of the fill "in varying amounts," however, the possibility of even scattered and isolated subsidences was necessarily contemplated. Subsidences meant, moreover, that additional fill material would be required, and the furnishing and placing of such material would extend, in turn, the appellant's time for performance. Thus a remedy was also provided for the very situation which could be regarded as unfavorable. Having failed to prove that it had encountered a changed condition, the appellant cannot obtain under Section 20 of the General Conditions the very form of relief to which it would have been entitled if it had succeeded in establishing such a condition. Moreover, the appellant never requested at any time during the performance of the contract that the contracting officer exercise his authority to suspend the work, and while it is perfectly true that this authority may be exercised by the Board retroactively, the Board would be unable to determine on the basis of the present record at what point in the performance of the contract the contracting officer should have exercised the authority, which under the circumstances of the present case would have been discretionary.

There is, finally, the appellant's request for an extension of time of 12 days by reason of having encountered unusually severe weather.²⁵ The contracting officer erred in his theoretical approach to this request, for the mere fact that the number of days claimed were not consecutive and amounted to less than 2 percent of the total contract performance time did not disentitle the appellant to an extension of time if the weather on the days claimed was in fact unusually severe. Weather may be said to be "unusually severe" within the meaning of clause 5 of the General Provisions of the contract when it is more severe than the average weather for the particular locality and season of the year. The appellant has submitted some weather data to the Board but unfortunately this data emanates from Trenton, New Jersey, which is approximately 50 miles inland from Oceanville, New Jersey, where the contract work was done, and it is, moreover confined to the particular months in 1955 and 1956 which include the 12 days in question, except for some comparative notations in the reports concerning the weather for the same months in prior

²⁵ The 12 days listed by the appellant are August 12 and December 9, 1955, and the following days in 1956: January 13 and 16; February 2 and 17; March 14, 16, 19, 20 and 29; and April 24.

November 1, 1957

years. From this rather limited weather data, however, the conclusion seems to be justified that August 12, 1955, which was an extremely wet day when high winds approaching hurricane force prevailed, and March 19 and 20, 1956, which were days when a heavy snowfall of 12 inches occurred, were days of "unusually severe weather." The Board is of the opinion, therefore, that an extension of time of three days should have been allowed by the contracting officer, and he is directed to take appropriate action for the refunding of \$900 to the appellant from the amount withheld as liquidated damages.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F.R. 9428), the findings of fact and decisions of the contracting officer dated April 13, 1956, and June 21, 1957, are affirmed, except as modified above.

WILLIAM SEAGLE, *Member*.

We concur:

THEODORE H. HAAS, *Chairman*.

HERBERT J. SLAUGHTER, *Member*.

RESPONSIBILITY OF THE SECRETARY OF THE INTERIOR UNDER THE FLOOD CONTROL ACT OF 1944 FOR IRRIGATION FUNCTIONS AT DAM AND RESERVOIR PROJECTS OPERATED UNDER THE DIRECTION OF THE SECRETARY OF THE ARMY *

Secretary of the Interior—Bureau of Reclamation: Authorization

The Secretary of the Interior is charged with the responsibility, under section 8 of the Flood Control Act of 1944, for the repayment of allocations to irrigation functions of dam and reservoir projects operated under the direction of the Secretary of the Army.

Secretary of the Interior—Bureau of Reclamation: Authorization

The foregoing responsibility exists whether or not additional facilities are required for irrigation functions at such dam or reservoir projects.

Secretary of the Interior—Bureau of Reclamation: Repayment and Water Service Contracts

*This opinion was not released until December 15, 1958, the date of the Attorney General's opinion which follows on page 549.

The foregoing responsibility requires negotiation of appropriate repayment contracts with water users for repayment of appropriate allocations to irrigation functions.

Statutory Construction: Legislative History

The literal terms of individual provisions of an entire act cannot be isolated and adhered to blindly, but the act must be construed as a whole to give effect to the intent of the legislature, and legislative materials are an appropriate aid in determining such intent.

Statutory Construction: Generally

Courts will look to the reason for a statute's enactment and antecedent history and give it effect in accordance with its design and purpose, sacrificing if necessary its literal interpretation in order that the statute's overall purpose will not fail.

Statutory Construction: Generally

The appropriation of funds by Congress with knowledge of an administrative position assumed by the responsible executive agency, and in the absence of any inconsistent action by the Congress, may be considered in support of the administrative position taken.

M-36475

NOVEMBER 1, 1957.

TO THE SECRETARY OF THE INTERIOR.

You have requested my opinion concerning the authority granted to the Secretary of the Interior by section 8 of the Flood Control Act of 1944 (December 22, 1944, 58 Stat. 887, 891), with respect to the irrigation functions of dam and reservoir projects operated under the direction of the Secretary of the Army. Specifically, you have asked whether the Secretary of the Interior is charged with the responsibility for negotiating a contract with the water users for repayment of an appropriate allocation to irrigation of the costs of Isabella Reservoir on the Kern River (San Joaquin Valley, California) in conformity with the requirements of the Federal reclamation laws.

My answer is in the affirmative with respect to Isabella Reservoir, and this applies as well to Terminus Reservoir (Kaweah River), Success Reservoir (Tule River), and Pine Flat Reservoir (Kings River Project), which we have discussed. While all four of these reservoirs are authorized for construction under the direction of the Secretary of the Army in the Flood Control Act of 1944, section 8 of that Act is not limited to authorizations for construction contained therein but is of general applicability thereafter to "dams and reservoirs operated under the direction of the Secretary of War [Secretary of the Army]."

Subject to certain *provisos* not here pertinent, section 10 of the 1944 Act provides:

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That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized * * * for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated * * *.

San Joaquin River

The project for the Isabella Reservoir on the Kern River for flood control and other purposes in the San Joaquin Valley, California, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in his report dated January 26, 1944, contained in House Document Numbered 513, Seventy-eighth Congress, second session, at an estimated cost of \$6,800,000.

The plan for the Terminus and Success Reservoirs on the Kaweah and Tule Rivers for flood control and other purposes in the San Joaquin Valley, California, in accordance with the recommendations of the Chief of Engineers in Flood Control Committee Document Numbered 1, Seventy-eighth Congress, second session, is approved, and there is hereby authorized \$4,600,000 for initiation and partial accomplishment of the plan.

The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-sixth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated cost of \$19,700,000: *Provided*, That the conditions of local cooperation specified in said document shall not apply: *Provided further*, That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further*, That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations.

Section 8 of the act provides as follows:

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore

constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

It is to be noted that the authorization in each case included in the quotation from section 10 above is for a reservoir "for flood control and other purposes", each to be "in accordance with" plans and recommendations designated in the text. Consistently therewith, the first sentence of section 8 of the Act provides for a determination by the Secretary of the Army, upon recommendation by the Secretary of the Interior, that any such dam and reservoir project may be utilized for irrigation purposes as one of the "other purposes" for which construction was authorized. This sentence contains a recognition by specific provision that "additional works" *may* be required in order to utilize the reservoir for irrigation purposes. These additional works are not included in the authorization for construction of the dam and reservoir, but rather are required by the second sentence to be reported in accordance with the Federal reclamation laws for "specific authorization of the Congress by an authorization Act." The final portion of the sentence deals with repayment of those costs "of structures and facilities used for irrigation and other purposes" allocated to irrigation. This clearly contemplates an allocation of an appropriate share of the cost of joint facilities including the dam and reservoir.¹

Thus the Congress provided with respect to prospective situations wherein, in connection with the reservoirs authorized for construction, additional works would be determined necessary in order to utilize for irrigation purposes reservoirs "operated under the direction of" the Secretary of the Army. This much of the section would seem to complete the legislative provision for such situations, namely, where additional facilities are required, including the requirement that such works be constructed, operated and maintained "under the provisions of the Federal reclamation laws."

The section then proceeds to lay down the general proposition that Dams and reservoirs operated under the direction of the Secretary of War [the Army] may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section * * *.

This sentence is not in terms limited to situations where additional works are required for irrigation purposes, nor is that limitation to be inferred inasmuch as the preceding sentences have already made provision respecting such situations. It is, therefore, to be construed to apply, just as it is stated, to "dams and reservoirs" under direction of the Secretary of the Army without further limitation. To

¹ The allocation procedure actually employed in connection with costs of Pine Flat Reservoir are indicated hereinafter.

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say that this sentence is limited to cases involving additional works would be to place upon the phrase "in conformity with" an interpretation foreign to its plain intendment, such as substituting "authorized in the manner provided by" or similar language. Looking to the definition of "conformity" (Webster's New International Dictionary, Second Edition, Unabridged) we find:

1. a Correspondence in form, manner or character; a point of resemblance, as of tastes. b Harmony; agreement; congruity;—now usually followed by *with*.
2. Action, or an act, of conforming to something established, as law or fashion; compliance; acquiescence.

From this we see that the substantive provision of the third sentence of section 8 is not *dependent upon* or a *part of* the limited provision for additional works, but is rather independent and requires treatment corresponding with, or conforming to, that prescribed in the prior provision. By "conformity" the sentence cannot refer to Congressional authorization of additional works, because that would be identical to that portion of prior provision dealing with a limited class of reservoirs. There is left only, then, the general meaning that in all cases of "dams and reservoirs operated under the direction of" the Secretary of the Army, the Secretary of the Interior shall "operate, and maintain, under the provisions of the Federal reclamation laws," such works for irrigation purposes, thus conforming to the prior provision. There is, incidentally, no dispute that the irrigation use is subject to regulation for flood control.

Thus it seems to us that the affirmative answer here given is clearly required by construction of the Act itself within its four corners. Likewise, if we look to the legislative history, the propriety of the answer becomes equally evident.

It is recognized that reasonable differences may exist as to the meaning of statutory language, and legislative materials are competent to show intention. *United States v. Dickerson* (1940) 310 U.S. 554. Events leading up to introduction of a bill and the circumstances indicating its purpose are appropriate for inquiry. *Collins v. Hardyman* (1951) 341 U.S. 651. After introduction of a bill the reports of legislative committees, including conference committees, are most commonly used and considered most authoritative extrinsic aids to construction. *N.L.R.B. v. Denver Bldg. Council* (1951) 341 U.S. 675; *Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board* (1949) 336 U.S. 301; *Gooch v. United States* (1936) 297 U.S. 124. The testimony of a witness concerning the meaning of a proposed amendment is regarded as evidence. *Railway Labor Association v. United States* (1950) 339 U.S. 142. And statements by a legislator who introduced a bill or who is in charge of a bill, as well as

discussions on the floor of either chamber of the Congress are persuasive of legislative intention. *Fong Haw Tan v. Phelan* (1948) 333 U.S. 6; *N.L.R.B. v. Denver Bldg. Council, supra*; *Ahrens v. Clark* (1948) 335 U.S. 188.

The expressions of administrative views which were made known to the Congress during its deliberations on the bill (H.R. 4485, 78th Cong.), expressions of responsible members and agencies of the Congress during its deliberation, and the position taken by the President and other responsible officials in the executive branch after enactment of the legislation, which position has never been denied by action of the Congress, are persuasive. Those portions of the legislative history and administrative construction which are strictly pertinent to this inquiry are outlined herein.

Under date of February 7, 1944, the President wrote to the Chairman of the House Flood Control Committee. Pertinent excerpts from that letter follow:

Over two years ago, on May 5, 1941, I wrote to you about the Kings River project and the Kern River project in California. Your committee was then considering the authorization of both of these projects for development by the Corps of Engineers under the jurisdiction of the Secretary of War. * * * I said, in part: "Good administration continues to demand that projects which are dominantly for irrigation should be constructed by the Bureau of Reclamation, Department of the Interior, and not by the Corps of Engineers, War Department. The Kings River project is authorized for construction by the Bureau of Reclamation at this time. The proposed project on the Kern River * * * is dominantly an irrigation project * * *. Neither of these projects, therefore, should be authorized for construction by the Corps of Engineers. To do so would only lead to needless confusion." That letter is applicable today.

The President stated that "*these projects should be constructed by the Bureau of Reclamation*" and the cost charged to irrigation should be "financed on the basis of the prevailing Federal policy of 40 annual payments by irrigation beneficiaries." Further, he stated that "*these projects should be maintained and operated by the Bureau of Reclamation*, but operation for flood control should be in accordance with regulations prescribed by the Secretary of War." The President's concluding paragraph contained the following:

No matter what agency builds a multiple-purpose structure involving in even a minor way the interests of the other, the agency with the responsibility for that particular interest should administer it in accordance with its authorizing legislation and general policies. For example, *the Bureau of Reclamation in the Department of the Interior should administer, under the Reclamation laws and its general policies; those irrigation benefits and phases of projects built by the Corps of Engineers.* [All italics in the President's letter supplied.]

From the position of the President stated in this letter, the matter has a demonstrable continuity through the course of deliberations

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of the Congress and the enactment and approval of the bill. The awareness on the part of Congress of the executive position, and the treatment accorded the President's request, will be apparent hereinafter.

At the outset, it is obvious that the final enactment did not meet one part of the President's request, namely, that "these projects should be constructed by the Bureau of Reclamation," as the reservoirs themselves were authorized for construction under the supervision of the Chief of Engineers (section 10). The simple question, then, is whether the final enactment met the President's request that "these projects should be maintained and operated by the Bureau of Reclamation, but operation for flood control should be in accordance with regulations prescribed by the Secretary of War."

In this connection, note should be taken of an exchange between the Secretary of the Interior and the Director, Bureau of the Budget. Under date of April 5, 1944, the Director requested the views of the Secretary with respect to H.R. 4485.² The Secretary replied on April 10, 1944, and supplemented that letter under date of April 21, 1944, by setting out specific amendments which he recommended for the pending bill. The third amendment which he recommended was a substitution for section 6 of the bill (which finally became section 8). The comment in his letter covering this amendment was:

The * * * third, and fourth amendments are in accord with the principles expressed in the President's letter of February 7 with respect to H.R. 3961, the omnibus rivers and harbors bill. They also follow closely the amendments to that bill suggested in my report to the Senate Committee on Commerce, to which you stated there was no objection in your letter of April 15. The differences in the text of the amendments are primarily accounted for by the need of fitting them into the framework of H.R. 4485, the general provisions of which are of considerably broader application than the corresponding provisions of H.R. 3961.

Here, then, the President's Cabinet officer responsible for the subject matter proposed specific amendment to meet a part of the President's policy; and it is pertinent to examine that proposal, so couched, with relation to that part of the legislation finally enacted as section 8. For a clear conception of that relationship, there follows a composite of the Secretary's proposed amendment and the final section 8, the material struck through appearing only in the Secretary's proposal, the material underlined appearing only in the act, and the clear text being common to both:

Sec. 68. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War ~~can be consistently~~ *may be*

² Later enacted as the Flood Control Act of 1944.

utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto), ~~or under the provisions of other applicable laws~~, such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws ~~or other applicable laws~~ and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing. *Provided, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigational purposes.*

It will be seen that *none* of the differences represented, including the requirement for Congressional authorization, is controlling with respect to the question to which our considerations are here addressed.

Thereafter, from the Executive Office of the President, the Acting Director, Bureau of the Budget, replied to the Secretary under date of May 20, 1944, and said concerning this particular point:

* * * I note that the House of Representatives has, since you wrote, amended section 6 [later section 8] by the insertion of the words "under existing reclamation law" to define the regulations to be prescribed by the Secretary of the Interior in connection with the use of storage for irrigation at War Department dam and reservoir projects. It would seem to me that this change would give the Department of the Interior all the authority necessary.³

³ In H.R. 4485 as introduced, section 6 read as follows:

SEC. 6. Hereafter, whenever in the opinion of the Secretary of War and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary of War can be consistently used for reclamation of arid lands, it shall be the duty of the Secretary of the Interior to prescribe regulations for the use of the storage available for such purpose, and the operation of any such project shall be in accordance with such regulations. Such rates, as the Secretary of the Interior may deem reasonable, shall be charged for the use of said stored water; the moneys received to be deposited in the Treasury to the credit of miscellaneous receipts.

Before referral to the Senate, the above portion of section 6 had been amended by the House to add "under existing reclamation law" following "to prescribe regulations." This House amendment, however, as previously noted, was not the final form of the provision. Following the action of the Committee of Conference, which is noted hereinafter, the managers on the part of the House of Representatives, in reporting back to the House (H.Rept. No. 2051, 78th Cong., 2d Sess.), stated:

This amendment of the Senate replaces section 6 of the House approved bill with certain modified language substantially as requested by the Secretary of the Interior and constitutes section 8 of the Senate approved bill. The Senate language will provide for more effective administration in relation to the various technical features of the Federal reclamation law. It establishes a procedure for the utilization of multiple-purpose projects for irrigation purposes when the Secretary of War determines upon recommendations of the Secretary of the Interior that a project operated under the direction of the Secretary of War may be utilized for irrigation purposes.

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It was after this exchange that Senator Overton, on June 22, 1944, submitted to the Senate Report No. 1030 to accompany H.R. 4485, recommending passage with amendments. Amendment No. 10 in that report set out the language of section 8 down to the *proviso* precisely as it appears in the act. Concerning this amendment, the Committee Report stated:

During the hearings and also by letter the Secretary of the Interior expressed to the committee his views with regard to the utilization of multiple purpose projects under the control of the War Department where irrigation may be involved and he expressed the view that the language in H.R. 4485, if modified would provide for more *effective administration in relation to the various technical features of the Federal Reclamation laws*. The committee therefore recommends the adoption of amendment No. 10 which is *generally in accord with existing law and the expressed views of the Secretary of the Interior*. [Italics supplied.]

This is a significant point in the progress of the legislation. It is clear that neither the President nor the Secretary of the Interior, on the one hand, nor the Senate Committee, on the other hand, made any distinction concerning the responsibility for operation and maintenance for irrigation purposes on the basis of whether or not additional works were found to be required. True, the section requires specific authorization of additional works "upon recommendation by the Secretary of the Interior" that such a reservoir is useful for irrigation purposes, but those are only such works "*as he may deem necessary for irrigation purposes*." [Italics supplied.] The absence of any reference in the third sentence of section 8 to a determination that additional works were or were not to be necessary denies any alleged distinction in jurisdiction based on the Secretary's determination with respect to the necessity for additional works.

Although Senate Report No. 1030 of June 22, 1944, noted above, does not set forth a report from the Secretary of the Interior, the statement quoted from the report is presumed to refer to the Secretary's letter of June 2, 1944, to Senator Josiah W. Bailey, Chairman of the Committee on Commerce. In that letter, the Secretary recommended enactment of H.R. 4485 provided it was amended "substantially" along certain lines. His recommendation pertinent here is as follows:

Fourth, I regard section 6 [later section 8] of the bill as intended to provide for the application of the Federal reclamation laws to projects having irrigation possibilities. The desirability of such application is discussed in the portion of my report of April 17 which deals with provisions of this section of the rivers and harbors bill. However, the provisions of this section are not entirely apt in their relation to the various technical features of the Federal reclamation laws. For this reason, I would much prefer to have the section read substantially in accord with the following proposed amendment: [Italics supplied].

He then set out a form of amendment identical with that proposed in his letter of April 21, 1944, to the Bureau of the Budget as noted above. There certainly is not the slightest hint in the Secretary's expressed views, or in the Congressional response by adoption of the amendment, that the jurisdiction of the Secretary or the application of the Federal reclamation laws was to be limited to cases where additional works were required. On the contrary, among those "projects having irrigation possibilities" as stated by the Secretary, he specifically advised Senator Bailey concerning the four projects which we are discussing, as follows:

Each of the foregoing projects is a logical extension of the main Central Valley project now under the jurisdiction of the Bureau of Reclamation in this Department. Moreover, each of these projects is dominantly an irrigation project. * * * The President has, on more than one occasion, expressed the firm view that the Kings River and Kern River projects are dominantly irrigation projects and that they ought to be built by the Bureau of Reclamation. I have urged the same view many times. These considerations apply with equal force to the Terminus and Success reservoirs * * *.

These four projects to which the *special attention* of the Congress was invited are four reservoirs which "may be utilized for irrigation purposes" by the terms of the act which *do not require the authorization or construction* of "additional works in connection therewith" for irrigation purposes.

During the latter period of consideration of H.R. 4485 by the Senate, there was affirmative pressure to amend the bill so as to remove the application of the Federal reclamation laws from conservation storage in these Army reservoirs. The President referred to this in his letter of August 7, 1944, to Senator John H. Overton wherein he stated:

It may well be that testimony before your Committee in favor of the construction of these projects by the Corps. of Engineers was a reflection of the desire of certain large land interests in California to obtain irrigation and other benefits without being subjected to the repayment requirements and the other public safeguards that are a part of the reclamation law, but I do not believe that this should be allowed to obscure the fundamental objectives of that law. In this connection, I was pleased by the inclusion of the irrigation amendment. The President then reiterated his view that construction should be by the Bureau of Reclamation.

Further note is taken of this pressure in the letter of the Secretary of the Interior to the Vice President on November 21, 1944. The Secretary said in part,

In the interest of sound reclamation development in the western United States, I call to your attention recent proposals, regarding the Rivers and Harbors bill and the Flood Control bill, which will be urged upon the Senate when it gives active consideration to those measures. These proposals, if adopted,

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would breach the long-established policies of the Congress under which reclamation development in the West has proceeded since 1902 in a manner that has gained for it bipartisan and nation-wide support.⁴

Later, on November 29, 1944, the Secretary addressed Senator Hill, the Acting Majority Leader, in part as follows:

The long-established reclamation policies of the Congress are at stake in the Flood Control bill, H.R. 4485. Proposed amendments, which may be debated today, would authorize the Corps of Engineers to develop and dispose of irrigation water storage without regard to the repayment and land policies of the Federal reclamation laws.

The * * * California interests initiated a proposed amendment of section 8 in the bill as reported to the Senate. * * * The Californians' proposed amendment would delete from the section, as reported to the Senate, the provision that dams and reservoirs under the jurisdiction of the War Department may be utilized for irrigation purposes only in conformity with the provisions of this section.

The amendments to which these references were made were not adopted. Further, to show that the President had before him, when he completed the legislative process by signing the bill, the accepted construction of the provisions of the bill in this respect, reference is made to the Secretary's report on the enrolled bill under date of December 20, 1944. The Secretary stated in part:

Were H.R. 4485 to be approved, the situation of the California projects would be as described below. The Corps of Engineers would be authorized to build a number of projects in the Central Valley area of California, including the Kings River Project and the Kern River Project. * * * Under Section 8 of the bill, the use of water from those projects for irrigation purposes would be subject to the jurisdiction of the Secretary of the Interior and would be governed by the Federal reclamation laws. In net effect, therefore, while the Corps of Engineers would be authorized to construct the projects and to operate them for flood control purposes, their use for reclamation * * * would be governed by the reclamation laws and their administration for these purposes would be vested in the Secretary of the Interior.

It is thus clear that the President signed the bill with the knowledge that the amendments as described above were not adopted by the Congress and with the statement of the Cabinet officer asserting responsibility for the reclamation functions before him.

As to the awareness on the part of the Congress of the construction of the bill consistent with the position here taken, we need only refer to the record of the proceedings on the floor of the Senate after the bill was reported to the Senate by the Committee of Conference. The Congressional Record for December 12, 1944, at page 9403 [90 Cong. Rec. 9264] sets out the following exchange between Senator

⁴ Some of these proposals appear in the Congressional Record for September 19, 1944, at page 7988. [90 Cong. Rec. 7882].

Overton and Senator Hill, the Acting Majority Leader, concerning section 8 as reported from the conference:

Mr. HILL. There still seems to be confusion on the part of some Senators with reference to the application of reclamation laws in regard to some of these projects.

I heard the distinguished senior Senator from Louisiana, when the bill was under consideration, and I think he made it very clear. However, I wish to ask this question: Is it not a fact that section 8 of this bill, as agreed to in conference, makes some reclamation laws applicable to the handling of irrigation water of any of the projects, including California projects, where it is found that irrigation may be carried out? I ask the Senator in charge of the bill whether it is not a fact that the President wanted the California projects in this bill constructed under the Bureau of Reclamation so that the water policies would conform to reclamation laws?

Mr. OVERTON. The Senator is correct with respect to the projects in the so-called Central Valley of California. The President wrote me and the chairman of the subcommittee in this regard. However, in view of the fact that the Senate amendment made not only the California projects but all such projects subject to irrigation laws, and in view of the fact that the House concurred in this action by agreeing to section 8 of the Senate bill, I am sure that the President will feel that we have met the problem that he raised. Section 8 of the bill clearly places reclamation uses of water from these projects under the Secretary of the Interior and under the applicable reclamation laws. No project in this bill which may include irrigation features is exempted from the reclamation laws.

Mr. HILL. I thank the Senator.

Mr. OVERTON. The Senate amendment made not only the California projects, but all such projects subject to the irrigation law. In view of the fact the House concurred in that action by agreeing to section 8 of the bill, I am sure the Senator from Alabama will feel that we have met the question which he has raised. As I stated a while ago, section 8 of the bill clearly places reclamation uses of water from all projects authorized in this bill under the Secretary of the Interior, and under the applicable reclamation laws.

Mr. HILL. I thank the Senator.

In the light of the foregoing, it is difficult to visualize a legislative history which would disclose more clearly a situation wherein responsible officials, executive and legislative alike, more consciously and purposefully strove to bring about results in legislation according to their own views, with clearer mutual understanding of the objectives sought, the progress step by step, and the final legislative result of the efforts. In fact, this history appears to be devoid of contradictory persuasion, and the cumulative effect of the steps through which it progressed cannot be ignored.

One provision of the 1944 act with respect to Pine Flat Reservoir, which is not applicable to the other three projects here considered, occurs in the authorization under section 10. The "project for flood control and other purposes for the Kings River and Tulare Lake Basin" is there authorized "substantially in accordance with" the

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plans in House Document No. 630, 76th Congress, Third Session, with the following *provisos*:

Provided, That the conditions of local cooperation specified in said document shall not apply: *Provided further*, That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further*, That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations.

The stated condition which the first *proviso* removed was set out in the report of the Chief of Engineers (H. Doc. No. 630) requiring that local interests contribute \$4,710,000 toward first costs and maintain and operate all the works after completion. It is understood that the potential conservation benefits would be realized without the construction of additional facilities other than two weirs to measure inflow and outflow at the reservoir,⁵ and the *proviso* appears to have the obvious purpose of changing the form of local participation to that of payment for conservation storage when used.

Recognizing the literal terms of the *proviso* to be that "the Secretary of War [the Army] shall make arrangements for payment," I cannot agree that this controls the effect of the Act as to jurisdiction and as to the application of the reclamation laws in the conservation use of reservoir storage. The literal terms of the *proviso* cannot be isolated and adhered to blindly.

A pertinent view is expressed by Judge Learned Hand in *Guiseppe v. Walling*, 144 F. 2d 608, 624 (1944), where he said "There is no surer way to misread any document than to read it literally * * *." And the Supreme Court in *Longshoremen v. Juneau Spruce Corp.*, 342 U.S. 237, 243 (1952) reminds that "literalness is no sure touchstone of legislative purpose."

In *United States v. Dickerson*, 310 U.S. 554 (1940), the Supreme Court discussed the use of legislative materials as aids to statutory construction and stated:

It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand and Gravel Co. v. United States*, *supra*, at 48. The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction * * *. [Italics supplied.]

⁵ Report of the Board of Engineers (H. Doc. No. 630, *supra*).

In the *Boston Sand and Gravel* case cited (278 U.S. 41, 1928) the Court stated in part as follows:

It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.

The conclusion that section 8 of the act must be construed to govern is amply supported in principle by precedents of statutory construction and statements of the principle laid down by the Supreme Court. The principle is particularly clearly enunciated in the following two cases and cases cited therein. In *Securities and Exchange Commission v. Joiner Leasing Corp.* (1943), 320 U.S. 344, the Court refers to some of the maxims laid down in the construction of statutes and stated:

Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

Particularly pertinent to the construction of section 10 in the light of section 8 is the discussion by Justice Butler in *Helvering v. N.Y. Trust Co.*, 292 U.S. 455 (1934), where he says:

The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. *Commissioner of Immigration v. Gottlieb*, 265 U.S. 310, 313. *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 37. But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown v. Duchesne*, 19 How. 183, this court said (p. 194): "It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning." Quite recently in *Ozawa v. United States*, 260 U.S. 178, we said (p. 194): "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal mean-

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ing in order that the purpose may not fail." And in *Barrett v. Van Pelt*, 268 U.S. 85, 90, we applied the rule laid down in *People v. Utica Ins. Co.*, 15 Johns. 358, 381, that "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, *and a thing which is within the letter of the statute, is not within the statute, unless it is within the intention of the makers.*" [Italics supplied.]

A persuasive statement of the principle appears in *Johansen v. United States*, 343 U.S. 427 (1952) wherein the Court was considering a provision of the Public Vessels Act of 1925. In a suit by civilian members of the crews of Army transport vessels, the Court stated:

If the congressional purpose was to allow damages for personal injuries sustained by Federal employees while in the performance of duty, the literal language of the act would allow action of the nature of those before us.

This general language, however, must be read in the light of the central purpose of the act, as derived from the legislative history of the act and the surrounding circumstances of its enactment.

The Court then points out certain historical factors concerning the subject matter of the legislation and states:

With such a legislative history, one hesitates to reach a conclusion as to the meaning of the act by adoption of a possible interpretation through a literal application of the words.

After a rather exhaustive review of other related legislation the Court concludes that:

As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.

The legislative history of the act, which demonstrates the intention of Congress that section 8 govern in the circumstances here involved, has been analyzed earlier in this memorandum. In addition and equally available under the foregoing principles enunciated by the courts, and likewise persuasive, is the entirety of the provisions of the Flood Control Act of 1944.

The principal policy of the Congress expressly stated in the first section of the act is "to facilitate the consideration of projects on a basis of comprehensive and *coordinated* development." [Italics supplied.] Responsibility for planning works for navigation and flood control are placed in the Secretary of the Army; those for irrigation and incidental purposes in the Secretary of the Interior; certain measures for watershed protection and soil-erosion prevention in the Secretary of Agriculture. (Sections 1 and 2.)

Section 9 approved the general comprehensive plans for the Missouri River Basin which consisted of reports prepared by the Department of the Army (House Document 475), and by the Department of

the Interior (Senate Document 191), as revised and coordinated in Senate Document 247. Section 9(b) assigned the plan of flood control to the Department of the Army and section 9(c) required the reclamation and power developments to be undertaken by the Secretary of the Interior to be governed by the reclamation laws. Thus section 9 carries, for the Missouri Basin, the coordination of responsibility and jurisdiction provided for generally elsewhere in the act.

Further, section 7 gives to the Secretary of the Army the regulatory authority for flood control and navigation at Federal reservoirs, and section 6 specifically authorizes him to contract the surplus waters at reservoirs under his control for domestic and industrial uses.

Moving to section 8, there is no doubt of the specific authority of the Secretary of the Interior to "construct, operate, and maintain * * * additional works in connection therewith as he may deem necessary for irrigation purposes" after action by the Congress, all "under the provisions of the Federal reclamation laws." It there provides that "dams and reservoirs operated under the direction of the Secretary of War [the Army] may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section * * *." Now it is suggested by some that conservation uses at reservoirs of a limited class, namely, those not requiring additional works for such use, are somehow placed under the jurisdiction of the Secretary of the Army.

There is obvious intention and effective prescription for delineation and coordination of functions between the two Departments exhibited in those portions of the act just outlined. The entire range of potential uses of the reservoirs is covered. To segregate this limited class of reservoirs wherein additional works are not required, from the general provisions of section 8 governing conservation use would at the least be a strained construction based on no logical distinction recognized in or deductible from the act itself. Uncertainty in the construction of these provisions leads only to a situation wherein the water users are bidders for the greatest favors in their view as between the governing policies of the two Departments. I cannot accept the view that the act is uncertain in this respect when read from beginning to end as a comprehensible document.

Our construction of the act above outlined is sustained not only by its terms and structure when considered as an entirety, and by the legislative history discussed at length, *supra*, but, in addition, by actions of the Congress and of the executive branch subsequent to the passage of the Flood Control Act of 1944.

The Kings River project receives some emphasis in certain of these subsequent actions because (1) physical construction commenced

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earlier than in other projects, and (2) the *proviso* referred to was picked up in some quarters as being meaningful.

The War Department Civil Appropriation Act, 1947 (act of May 2, 1946, 60 Stat. 160), contained an appropriation of \$1,000,000 for the project subject to the following:

Provided, That none of the appropriation for the Kings River and Tulare Lake project, California, shall be used for the construction of the dam until the Secretary of War has received the reports as to the division of costs between flood control, navigation, and other water uses from the Bureau of Reclamation and local organizations and, with the concurrence of the Secretary of the Interior, shall have made a determination as to what the allocation shall be: *Provided further*, That the reports from these continuing studies shall be made not later than six months from the date of the enactment of this Act and that the agreement of concurrence shall be made not later than nine months from the date of the enactment of this Act.

With respect to this item, the President issued a statement on May 3, 1946, in which he stated in part as follows:

The War Department Civil Functions Appropriation Bill, 1947 (H.R. 5400), which I approved on May 2, 1946, makes appropriations for a number of thoroughly worth-while projects that will further the development of the water resources of the Nation. I am also glad to note that the Congress, by the addition of certain provisos to the item for the Kings River Project, California, has afforded an opportunity for assuring that the Federal reclamation policy, including repayment and the wide distribution of benefits, will apply to that project. This is in accordance with the view that I have heretofore expressed and the position repeatedly taken by the late President Roosevelt. It is consistent with the policies laid down by the Congress in the Flood Control Act of 1944.

* * * * *

In the meantime, in view of the legislative history of the provisos in the Kings River item, and in view of the disadvantageous position in which the Government would be placed if repayment arrangements were unduly postponed, I am asking the Director of the Budget to impound the funds appropriated for construction of the project, pending determination of the allocation of costs and the making of the necessary repayment arrangements.

Pre-release copies of this statement were transmitted by the President, by letters of May 2, 1946, to the Secretary of War and the Secretary of the Interior. He requested the Secretary of the Interior to "issue instructions to the Commissioner of Reclamation to proceed forthwith to make the necessary repayment arrangements with the prospective water users," and advised the Secretary of War that "The Chief of Engineers should join with the Commissioner of Reclamation in advising prospective water users of the desirability of early action on their part in the making of the necessary repayment arrangements."

The President's statement shows that it was not his purpose to

proceed administratively in a manner contrary to the legislation; rather, he clearly stated his view that the policies embodied in both the 1944 act and the appropriation act sanctioned the course which he directed. The construction given to a statute by those officials in the executive branch upon whom the duty of executing its provisions devolves is entitled to great weight in the judicial consideration of the meaning of the statute. *United States v. Zucca* (1956), 351 U.S. 91; *Deluxe Check Printers v. Kelm* (1951) 99 F. Supp. 783; *Douglas v. Edwards* (1924) 298 Fed. 229. It is pertinent also to recognize that those whose duties call upon them to interpret laws are often participants in the drafting of such laws. *Hastings and Dakota Railroad Company v. Whitney* (1889) 132 U.S. 357. "The construction to be given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." [*Id.*, 366.]

At this point, the case of *Kern River Co. v. United States* (1921), 257 U.S. 147, is worthy of some detailed attention. The controversy arose over the nature and extent of a right-of-way acquired by the Kern River Company under the act of March 3, 1891 (26 Stat. 1095), as supplemented by the act of May 11, 1898 (30 Stat. 404). The canal constructed on the right-of-way was used for the generation of electric power, but not for irrigation purposes. The 1898 act provided in part:

That the rights-of-way * * * may be used for purposes of a public nature; and said rights-of-way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.

The Court held that the United States was entitled to a decree declaring a forfeiture of the right-of-way, and Justice Van Devanter made the following analysis toward the Court's conclusion:

This section did no more than to permit rights of way obtained under the act of 1891, the use of which was restricted to irrigation, to be also used for the other purposes named in the section. Irrigation was still to be the "main purpose" and the other purposes were to be subsidiary. True, there are in the section words and punctuation from which it might be argued that the "purposes of a public nature" were to be independent and might even be exclusive; but the fair import of the section as a whole is the other way. Besides, its legislative history indicates that what actually was intended was to recognize irrigation as the primary purpose and to make all the other purposes secondary to it. When the bill was introduced in Congress it contained a provision declaring, without any qualification, that rights of way under the act of 1891 might be used for supplying water for "domestic, public, and other beneficial uses." The committee in charge of the bill sought the views of the Land Department, and the Assistant Commissioner of the General Land Office submitted a report wherein he criticised that provision as being too much of a departure from the principle and spirit of the act of 1891 and recommended that it be eliminated

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and the present section substituted in its stead. In explaining and commending the section he said: "If it were allowable to use the right of way for domestic or public purposes or for certain other purposes, which will not diminish the amount of water available for irrigation, as subsidiary to the main purpose of irrigation, the act of 1891 would be much more satisfactory in its operation and the intention of the act as conferring a general benefit would be fully subserved." The bill was amended in accordance with his recommendation and was enacted in that form. House Report, No. 2790, 54th Cong., 2d sess.; House Report, No. 279, 55th Cong., 2d sess. In administering the act of 1891 as thus supplemented the Secretary of the Interior was called upon to construe the section on several occasions and his decisions were uniformly to the effect that it regarded irrigation as the controlling purpose and all the other uses as essentially subsidiary. See 28 L.D. 474; 32 L.D. 452 and 461; 37 L.D. 78; House Doc. No. 5, pp. xii-xiii, 56th Cong., 1st sess.; *Utah Power & Light Co. v. United States*, *supra*. Even if the meaning were not otherwise made plain, we should be slow to reject the construction thus put on the section by the head of the department charged with administering it. *Logan v. Davis*, 233 U.S. 613, 627.

A more pertinent and persuasive precedent for the principles and methods of legislative construction which I have relied upon for the specific question covered in this opinion could hardly be found short of actual submittal of the instant inquiry to the Supreme Court.

Compatibly with the instructions of the President of May 2, 1946, *supra*, the Chief of Engineers and the Commissioner of Reclamation on June 24, 1946, signed a joint statement including the following:

By Congressional enactment and Presidential direction, provision has been made for Federal construction of the Pine Flat Dam after such time as the necessary allocations of costs and necessary repayment arrangements are made. Pending those determinations, the initial construction appropriations are impounded. The Army Corps of Engineers and the Bureau of Reclamation, in compliance with Congressional and Executive direction, each stand ready to proceed with their work on this beneficial project. Under existing Congressional authority, the Corps of Engineers will start construction after costs are allocated with the concurrence of the Secretary of the Interior, and after required repayments are insured by contract, under Reclamation Law, between the water users who are beneficiaries of the development and the Secretary of the Interior.

Thus, in aid of the negotiations with the water users of the Kings River, the President impounded the funds available for construction pending the "allocation of costs and the making of necessary repayment arrangements." Thereafter, the required study of allocation of costs was pursued by the two Departments, and on January 31, 1947, the Secretary of War, with the concurrence of the Secretary of the Interior, reported to the President the results of that study. He stated in part as follows:

If this were purely a flood control project it would be built entirely at Federal expense. Irrigation values are involved, however, and the War Department in making repayment arrangements for water conservation features as

required by the authorizing legislation could have proceeded without placing any special requirements on local water users, except the requirement of adequate repayment. The Bureau of Reclamation, on the other hand, operates under the Federal Reclamation Laws which require certain limitations in size of land holdings, and certain contract provisions before water can be supplied from such a project to water users. * * *

While this Department was directed by Congress in the Flood Control Act of 1944 to "make arrangements for payment to the United States by the State or other responsible agency, for conservation storage when used," these repayment arrangements are now to be made by the Commissioner of Reclamation in accordance with your instructions, and the Chief of Engineers and Commissioner of Reclamation issued a joint statement on June 24, 1946, to that effect. There must also be agreement between the Bureau of Reclamation and water users before repayment arrangements can be completed. This should not, however, delay further the initiation of the project and the providing of urgently needed flood control. * * *

I have already construed the provision that the Secretary of the Army "make arrangements for payment * * * for conservation storage where used" based on an assumption that he was intended to be the negotiating agent, and have concluded that the reclamation laws nevertheless govern the conservation use. Going even further, if the matter were to be analyzed from the point of view that the Secretary of the Army was authorized to make such arrangements without specific statutory guidance, it appears that he committed himself to the nature of those arrangements by the terms of his letter of January 31, 1947, referred to above. As indicated above, the act of May 2, 1946, required that the report of division of costs be made with the concurrence of the Secretary of the Interior not later than nine months from that date. In his letter complying with that requirement, concurred in by the Secretary of the Interior, he recommended to the President that "funds appropriated by the War Department Civil Appropriation Act of May 2, 1946, be released from impoundment by the Bureau of the Budget so that construction may be started without delay."

The recommendation of the Secretary of War referred, of course, to the announcement by the President on May 3, 1946, that the Director of the Budget was instructed to impound the funds "in view of the disadvantageous position in which the Government would be placed if repayment arrangements were unduly postponed," such impoundment to be effective "pending determination of the allocation of costs *and the making of necessary repayment arrangements.*" [Italics supplied.] The italicized portion is an obvious reference to the second *proviso* in the authorization of the Kings River project.

Thus, on the part of the Secretary of War, the January 31 letter affirmatively purported to (1) meet the dead-line set in the appropriation act for a determination of the allocation of costs, (2) carry

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out the directive contained in the Flood Control Act of 1944 to make arrangements for payment for conservation storage, and (3) meet the condition placed by the President on the release of funds for the construction of Pine Flat Reservoir. The Secretary's statement of the satisfaction of these several requirements appears in his letter as follows:

In view of the above considerations, the War Department proposes that the Kings River project be constructed immediately and operated initially for flood control. The project will not be operated for irrigation until agreement has been reached between the Bureau of Reclamation and local water users on the division of cost and on repayment arrangements. It is understood, however, that in flood control operation there will be no modification of natural stream flow except regulation essential to provide flood control. When the project is operated for irrigation such operation will be in accordance with agreements and contracts between the Bureau of Reclamation and local water users under Federal Reclamation Laws.

Accordingly, I recommend that funds appropriated by the War Department Civil Appropriation Act of May 2, 1946, be released from impoundment by the Bureau of the Budget so that construction may be started without delay.

It is inconceivable to me that this definitive and formal action by the Secretary of War, relied upon and concurred in by the Secretary of the Interior and transmitted to the President in conformity with an act of Congress and the instructions of the Chief Executive, can now be viewed by anyone as a tentative or temporarily useful statement of position to be thereafter denied and subjected to a complete reversal. I must reject any view that the matter is any longer open to question.

We may look, for example, to one immediate purpose and result of the statement of position by the Secretary of War. Briefly stated, the President had impounded construction funds to protect the interest of the United States pending the determination of allocation of costs and the establishment of repayment arrangements. On the strength of the allocation report in the letter and the stated arrangement for agreement to be "reached between the Bureau of Reclamation and local water users on the division of cost and on repayment arrangements", the President authorized the release of funds for expenditure by the Secretary of War pursuant to applicable directives. Pine Flat Reservoir was thereafter constructed and placed in operation by the Corps of Engineers.

Negotiation by the Bureau of Reclamation and the water users on the Kings River commenced actively more than 11 years ago. The complicated situation with respect to diversity of identity among water users as individuals, private companies and public organizations, and the complicated status of innumerable claims to the right to the use of

water, substantially all of which were covered by a certain Water Right Indenture and a certain Administration Agreement, supplemented and amended, which serve substantially in lieu of a judicial adjudication on the river, all made a rather formidable base for negotiation of the repayment of costs under the provisions of the reclamation laws.⁶ An additional obstacle to the efforts at negotiation has been the desire of important local interests to see the negotiation assumed by the Secretary of War unfettered by the requirements of the reclamation laws.

All of this negotiation has taken place in the presence of the well-understood fact that accepted practices of flood control at Pine Flat in themselves provide an important share of the conservation benefits created, and that the regulation for flood control can be so prescribed as to provide substantially all of those benefits. This fact is recognized, among other places, by necessary implication in the letter of the Secretary of War just quoted, as well as in the report of the Board of Engineers for Rivers and Harbors set out in House Document No. 630, *supra*.

One other item of legislative action should be noted in this connection. The bill for appropriation for civil functions of the War Department for fiscal year 1948, *supra*, included funds for the Pine Flat and Isabella Reservoirs. As a result of conference on the bill, House Report No. 1110, 80th Cong., 1st Sess., contained the following statement of the managers on the part of the House:

In making appropriations for the Isabella and Pine Flat Reservoirs in California, included in the total for flood control in the Senate amendment, page 9, line 5, the conferees do so with the understanding that, of course, the disposition of water therefrom for irrigation purposes will be subject to the Federal reclamation laws *in accordance with section 8 of the Act of December 22, 1944 (58 Stat. 887)*, and these reservoirs will be planned and operated in such fashion as will fully protect the integrity of the repayment principles of the reclamation law. [Italics supplied.]

Identifiable appropriations for the Bureau of Reclamation were requested and made for the expense of negotiating contracts on the Kings River and the Kern River as follows:

Interior Department Appropriation Act, 1947 (July 1, 1946, 60 Stat. 348, 367), Kings River Project, California, \$100,000. Interior Department Appropriation Act, 1948 (July 25, 1947, 61 Stat. 460, 475), Kings River Project, California, \$100,000. Interior Department Appropriation Act, 1949 (June 20, 1948, 62 Stat. 1112, 1129),

⁶For a record of the negotiations with the Kings River water users see "Excess Land Provisions of the Federal Reclamation Laws and the Payment of Charges," Part Two, prepared for the Subcommittee on Public Works and Resources of the Committee on Government Operations, House of Representatives, in May 1956.

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Kern River Project, California, \$42,500. After the appropriation act for fiscal year 1950, the construction fund appropriations to the Bureau of Reclamation were contained generally in a lump sum rather than in individual items. However, for fiscal year 1952 funds were requested for both Kings River and Kern River and were included in the total appropriation. In subsequent years specific requests were not made because unobligated balances were sufficient for purposes of contract negotiation and administration.

The appropriation of funds for this purpose after the administrative position assumed as noted above, and the absence of any inconsistent action of the Congress, may be considered in support of the position here taken. See *Chapman v. Federal Power Commission*, (1953) 345 U.S. 153; *Brooks v. Dewar*, (1941) 313 U.S. 354. The affirmative comments of the House Conferees on the occasion of the 1948 Civil Functions appropriation item serves to give added emphasis to the principle.

Since February 4, 1954, there have been in effect interim contracts with the Kings River Conservation District, representing substantially all of the water users, providing for the storage and release, subject to flood control, of irrigation water at Pine Flat and the manner of payment therefor by the water users. These have been negotiated by the Secretary of the Interior. The current contractual arrangements provide for the crediting of certain sums paid under these interim arrangements against obligations set forth in the repayment contract terms which have been under negotiation by the Bureau of Reclamation.

I have gone into some detail in the foregoing in order to make clear the underlying elements present and involved in a proper analysis of the question as to which you requested my opinion. In the light of these elements, to urge the view that the Secretary of the Army can now be considered authorized to negotiate a repayment contract with the water users in disregard of the requirements of the reclamation laws would be in direct contradiction of that which, in my opinion, became fixed as a matter of law certainly not later than the time of the letter of January 31, 1947. I cannot accept the view that that question is any longer open.

There remains only one observation which I consider to be of importance to the analysis of the question. I refer to the exchanges of views and the understanding reached by the Secretary of the Army and the Secretary of the Interior concerning the Pine Flat and Isabella Reservoirs at about the time of the negotiation of the first interim contract with the Kings River water users as noted above. On November 13, 1953, the Secretary of the Interior wrote to the

Secretary of the Army concerning the matter of contracting for conservation water use in the light of the fact that Pine Flat Reservoir would be in operation commencing that winter season. The Secretary referred to a proposal of the Department of the Army to execute an interim contract for "conservation operation" at Pine Flat during 1954, saying:

In our opinion, any contract of this nature should be executed between this Department and the water users and not between the Department of the Army and the water users. We believe that the Flood Control Act of 1944 places authority and responsibility on the Department of the Interior for negotiating and contracting under the Federal Reclamation laws with the water users below Pine Flat Reservoir for the irrigation benefits derived therefrom.

The Secretary of the Army replied under date of November 23, 1953, stating:

I assure you that the Corps of Engineers appreciates fully the responsibilities of the Bureau of Reclamation in negotiating and contracting for repayment for use of conservation storage in the project. * * * The negotiating of the contract by the Bureau of Reclamation is agreeable to this Department.

Later, on October 28, 1954, the Secretary of the Army wrote to the Secretary of the Interior concerning the use of conservation storage in the Isabella Reservoir. He stated that

The Department of the Army executed an interim contract with local interests in April 1954 after reaching an informal understanding with representatives of the Department of the Interior that your Department would be responsible for negotiating and executing the long term contract. * * * In view of the circumstances, including the negotiations which have been conducted to date by the Department of the Army and the desires of local interests, it is considered desirable that this Department complete the contracts in that case. I would appreciate your confirming that this is agreeable to you.

After a period of conferences on this matter, the Under Secretary of the Interior wrote to the Secretary of the Army on February 17, 1955, expressing the understanding reached in those conferences. He stated in part as follows:

As a result of our recent conferences with Assistant Secretary of the Army George H. Roderick and his staff, we now understand it to be acceptable to your Department, as it is to this Department, that the Department of the Army negotiate and execute a repayment contract with the local interests for conservation storage in the Isabella Reservoir, California, and the Department of the Interior similarly negotiate and execute a repayment contract for storage in the Pine Flat Reservoir, California. As a practical matter, this will facilitate further efforts of both agencies in consummating their respective contract negotiations, since the respective Departments have been negotiating with these districts and it would undoubtedly result in very material delays and dissatisfactions if we undertook to change the pattern at this time.

We subscribe wholeheartedly to the objective stated in your letter that con-

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tracts for service to irrigation from Federal reservoirs should be on a uniform basis.

The position of the Under Secretary as stated above looks to a "uniform basis" of continuing negotiations with the water users as a "practical matter" in the light of previous negotiations by the Department of the Army relating to Isabella Reservoir. The administrative action of the Under Secretary is understandable in the circumstances and in the absence of a definitive legal ruling. I must assume, at the same time, the intention to have been that, by whichever agency the negotiations with the water users were to be continued, the contracting was to be "on a uniform basis" consistent with the reference to "contracting under the Federal Reclamation laws" in the Secretary's letter of November 13, 1953, as quoted above.

By letter of May 7, 1957, the Assistant Secretary of the Interior requested the Assistant Secretary of the Army (CMA) to keep this Department advised concerning negotiations with respect to Isabella Reservoir, again urging a uniformity with the negotiations with respect to the Kings River.

As I have stated above, it is my view that section 8 of the Flood Control Act of 1944, properly analyzed without the use of extrinsic aids, provides the affirmative answer which I have given. It is equally clear that an understanding of the course of proceedings in both the legislative branch and the executive branch leads convincingly to the same conclusion.

ELMER F. BENNETT,
Solicitor.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

DECEMBER 15, 1958.

The HONORABLE,

The SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: This is in response to your request for my opinion with respect to a question arising in the administration of the Flood Control Act of 1944 (58 Stat. 887), particularly as it relates to the Isabella and Pine Flat Reservoir Projects constructed pursuant to section 10 of the act (58 Stat. 891-892, 901). The Department of the Army has also expressed its interest in the question.

I am advised that the Isabella Reservoir Project is a multiple-purpose dam and reservoir for flood control, irrigation and related pur-

poses located on the Kern River northeast of the City of Bakersfield in California. The Pine Flat Reservoir Project is a similar multiple-purpose dam and reservoir constructed in California on the Kings River east of the City of Fresno. It appears that all the necessary diversion works, canals and ditches for irrigation were constructed by the land owners in each vicinity prior to the construction of either the Isabella or Pine Flat project. However, in each case space in the dam not immediately required for flood control purposes can be used for the conservation storage of water. Water so stored can be released for irrigation purposes merely by opening the outlet valves of the dam. While no facilities in addition to those presently constructed are needed to serve the purposes of irrigation, the reservoirs and dams store waters so that they can be released when needed rather than being dissipated by natural flow down the channels. Therefore in each case the project substantially improves the irrigation water supply.

Section 10 adopts and authorizes "to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers" specified "works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes." The works specified include the Isabella and Pine Flat Projects. Section 8 of the act (58 Stat. 891, 43 U.S.C. 390) provides, subject to conditions contained therein, that when any such works may be utilized for irrigation purposes, "the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes." The section also provides that dams and reservoirs operated under the direction of the Secretary of War may be utilized for irrigation purposes only in conformity with its provisions.

The question originally presented was whether the Secretary of the Army or the Secretary of the Interior is responsible for contracting with respect to the disposition of irrigation benefits from dams and reservoirs constructed under the authority of section 10 where such benefits may be supplied without the construction of additional irrigation works. However, discussion with representatives of the Department of the Army and the Department of the Interior has disclosed that that question is of only incidental interest. The question of primary concern does not relate to which officer has the duty to contract on behalf of the Government in the circumstances, but rather whether the reclamation laws apply to any contract for the disposition of irrigation benefits which may be negotiated, irre-

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spective of which officer has that duty. This opinion therefore treats only with that question. The question of contracting responsibility is discussed merely to the extent that it bears upon the applicability of the reclamation laws.

I conclude that even though no additional works need be constructed to make irrigation benefits available from the projects in question, the Flood Control Act of 1944 requires that the reclamation laws apply to any contract for the disposition of irrigation benefits made available from the Isabella and Pine Flat projects. In connection with this conclusion it should be noted that irrigation use is subject to regulation for flood control. In addition, under the reclamation laws rights to the use or distribution of water vested under state laws are not affected.¹

1. *The provisions of the act.* The question here involved turns upon sections 8 and 10 of the Flood Control Act of 1944. Section 8 provides:

Sec. 8. Hereafter, whenever the Secretary of War² determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 368, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dams or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

Standing alone, the first two sentences of the section relate only to "such additional works in connection therewith" as the Secretary of the Interior "may deem necessary for irrigation purposes." Any impact which section 8 may have upon the question here considered must therefore turn upon the meaning of the first clause of the third sentence to the effect that

¹ Section 8 of the Reclamation Act of 1902 (32 Stat. 390; 43 U.S.C. 383). See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725.

² The title of the Secretary of War was changed to Secretary of the Army by section 205(a) of the National Security Act of 1947 (61 Stat. 495, 501; 5 U.S.C. 181-1(a)).

dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, * * *.

It has been urged that this provision is limited by the conditions of the first two sentences to situations in which additional works are required. If so, section 8 would not necessarily require that the reclamation laws apply to situations such as the instant ones in which no additional works are required for irrigation purposes.

In addition, it may be contended that section 10 of the act implies that the reclamation laws are not intended to apply to the Pine Flat and Isabella projects. Section 10 provides:

Sec. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein:

* * * * *

The language of section 10 authorizing construction of the Isabella project is as follows:

The project for the Isabella Reservoir on the Kern River for flood control and other purposes in the San Joaquin Valley, California, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in his report dated January 26, 1944, contained in House Document Numbered 513, Seventy-eighth Congress, second session, at an estimated cost of \$6,800,000.

The report of the Chief of Engineers referred to in the section does not indicate whether the reclamation laws were intended to be applicable to the Isabella project. Rather, he appeared to recommend that the whole question be deferred pending further studies. His report stated:

* * * The exact manner of use of the storage for irrigation purposes will be influenced by future developments in the area and must take cognizance of existing and future water rights established by State law and of the desires of the local interests owning such rights. Continuing studies by the Bureau of Reclamation, this Department, and the local organizations will establish the best plan of operation and appropriate cost allocations. Under these conditions it is considered appropriate that provision be made for the construction of the reservoir with Federal funds, and that after completion and when use thereof is made conservation interests be required to pay the United States for the beneficial use of the conservation capacity, either in lump sum or annual installments. [H. Doc. No. 513, 78th Cong., 2d Sess., p. 6.]

The Chief of Engineers further stated:

* * * Authority to construct should be understood to include authority to make modifications of the plans, to construct the reservoir at Federal cost,

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and to make arrangements for payment by the State or other responsible agency to the United States for the conservation storage when used. *Ibid.*, pp. 6-7.

In its report on H.R. 4485, which was enacted as the Flood Control Act of 1944, the House Committee on Flood Control stated with respect to the Isabella, or Kern River, Project that it "believes that the interests of the Bureau of Reclamation are fully safeguarded by the cooperative procedures recommended by the Chief of Engineers in his report, which recommendations attain the force of law through adoption of the report in the bill." H. Rept. No. 1309, 78th Cong., 2d Sess., pp. 40-41.

The Pine Flat Reservoir project was authorized by the following language of section 10:

The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-sixth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated cost of \$19,700,000: *Provided*, That the conditions of local cooperation specified in said document shall not apply: *Provided further*, That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further*, That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations.

The Chief of Engineers made a somewhat more specific recommendation as to the principles to guide the disposition of irrigation benefits from the Pine Flat project than he had made with respect to the Isabella project. He stated:

* * * Since the flood-control and water-conservation benefits, estimated to accrue to the project, are substantially equal, I am of the opinion that the first cost of the reservoir should be charged one-half to flood control and one-half to water conservation. Under Reclamation law the \$9,750,000 chargeable to water users would be repaid in 40 equal annual payments without interest, or at the rate of \$243,750 annually. This sum would carry the fixed charges, with interest rate of 3.5 percent and amortization in 40 years on \$5,210,000. I consider that this sum would be a fair charge to local interests for the conservation features of this multiple-purpose project. * * *. [H. Doc. No. 630, 76th Cong., 3d Sess., pp. 4-5.]

This recommendation is apparently what was referred to in the proviso to the authorization of the project as "the conditions of local cooperation specified in" the Chief of Engineers report which "shall not apply." Instead, the second proviso directs

That the Secretary of War shall make arrangements for payment to the

United States by the State or other responsible agency either in lump sum or annual installments, for conservation storage when used: * * *

In view of the foregoing, it may be seen that section 10 expressly provides that the Secretary of War shall make arrangements for payment for conservation storage with respect to the Pine Flat project and appears to adopt the recommendation of the Chief of Engineers with respect to the Isabella project that authority to construct should include authority to make arrangements for payment for conservation storage. In addition, in the case of Pine Flat the section appears to reject a formula for repayment which the Chief of Engineers considered to be derived from "Reclamation law." In the case of Isabella the grant of authority to the Secretary of War contemplates that it will be exercised in the light of future studies, but not necessarily in accordance with the reclamation laws.

From the foregoing it may be seen that the contention that the reclamation laws were not intended to apply to the Isabella and Pine Flat projects rests upon two bases: first, that section 8 does not apply to projects which do not require additional works in order to make irrigation benefits available; and, second, that the implication of section 10 is that the reclamation laws were not intended to apply to the two projects.

However, the interpretation of section 8 suggested above is subject to serious objection. Since the first two sentences of the section already deal with projects which require additional works for irrigation use, the view that the whole section applies only to such projects would make the third sentence redundant. It may, rather, be contended persuasively that the reference to "conformity with the provisions of this section" is intended to bring into play the basic provision of the first sentence, i.e., that the irrigation aspects of any dam and reservoir otherwise operated under the direction of the Secretary of War shall be "under the provisions of the Federal reclamation laws * * *." On balance I would be inclined to accept this interpretation. However, any doubt as to the meaning of section 8 and its interrelationship with section 10 may, I believe, be resolved by reference to the legislative history. *United States v. Local 807*, 315 U.S. 521, 528; *District of Columbia v. Murphy*, 314 U.S. 441. It also seems appropriate to test any implication which may be drawn from section 10 in the light of that history.

2. *The legislative history.* Beginning in 1939 there were substantial disputes relating to the projected dams and reservoirs on the Kern and Kings Rivers.³ Those disputes centered upon the inter-

³ See, e.g., Hearings before the House Committee on Flood Control, 77th Cong., 1st Sess., on H.R. 4911.

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related questions whether these were essentially flood control or irrigation projects, whether the Bureau of Reclamation or the Corps of Engineers should construct them, and which agency should administer the reclamation benefits which the projects might provide. The disputed questions also related to the conditions of local cooperation and the applicability of the reclamation laws, particularly the "160-acre" ⁴ and "antispeculative" ⁵ provisions.

The issues came to a head in connection with three bills which were considered in the course of the 78th Congress. These were H.R. 4679, the Department of Interior Appropriation Act for the fiscal year ending June 30, 1945 (act of June 28, 1944; 58 Stat. 463), H.R. 3961, the Rivers and Harbors Bill, and H.R. 4485 which was ultimately enacted as the Flood Control Act of 1944.

In connection with the Department of Interior Appropriation Bill, the House Appropriations Committee refused to approve a request for the sum of \$1,000,000 for preliminary work on the construction of the Kings River (Isabella) project. It referred to information presented to it by representatives from the area and called attention to the fact that the House Committee on Flood Control was considering the project as a flood control project. (H. Rept. No. 1395, 78th Cong., 2d Sess., p. 14.) The Senate Committee recommended restoration of the item because of objections to the repayment provisions recommended by the Chief of Engineers in H. Doc. No. 630, 76th Cong., 3d Sess., discussed above, and because the Committee believed that section 46 of the Omnibus Adjustment Act of 1926 would not apply to the project if it were constructed by the Corps of Engineers. S. Rept. No. 899, 78th Cong., 2d Sess., pp. 3-4. The item was again struck in conference (H. Rept. No. 1678, 78th Cong., 2d Sess., pp. 1, 14) and the bill was enacted without that provision. This, however, was obviously merely a preliminary skirmish which was resolved in the

⁴ Section 5 of the Reclamation Act of 1902 (32 Stat. 389, 43 U.S.C. 431) provides in part that:

* * * No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

⁵ Section 46 of the Omnibus Adjustment Act of 1926 (44 Stat. 649, 43 U.S.C. 423e) provides in part that contracts made by the Secretary of the Interior with irrigation districts:

* * * shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; * * *

light of the fact that the issue was being considered in other contexts.

In connection with consideration of H.R. 3961, the Rivers and Harbors Bill, the House adopted a section 4 which would have made the "excess-land provisions of the Federal reclamation laws" inapplicable "to lands which will receive a water supply from the Central Valley project, California." 90 Cong. Rec. 2765, 2921-2925. The Senate Committee recommended elimination of section 4 as it passed the House and proposed the insertion instead of a provision somewhat similar to section 8 of the Flood Control Act as it was ultimately adopted. S. Rept. No. 903, 78th Cong., 2d Sess., pp. 4-5; 90 Cong. Rec. 3676. However it differed from section 8 in that it expressly made the Reclamation laws applicable to the irrigation uses of works constructed by the Army pursuant to the bill and did not require, as does section 8, specific authorization by the Congress for the construction of additional irrigation works. During the Senate discussion, Senator Overton, Chairman of the Subcommittee of the Senate Committee on Commerce responsible for both the Flood Control and Rivers and Harbors Bills, offered an amendment to section 4 of the latter bill to make it identical with section 8 of the Flood Control Bill, indicating that the purpose of the change was to require specific Congressional authorization for the construction of additional irrigation works. 90 Cong. Rec. 8674-8675. He stated that the amendment "met with the approval of the Department of the Interior." *Ibid.*, 8675.

The third sentence of the Overton amendment was further amended on the floor of the Senate so as to make it read "in conformity with the Federal reclamation laws and the provisions of this section," thus, in substance, reinstituting the language of the original Senate Committee amendment. Senator Hatch who offered the floor amendment stated "It merely emphasizes the first line, but it makes no change." Senator Overton stated, "it is wholly unnecessary, but there is no objection to it." *Ibid.*, 8875. As so amended the bill passed the Senate. *Ibid.*, 9247, 9252.

However, the conference report recommended inclusion of both the Senate and House versions of section 4. H. Rept. 2070, 78th Cong., 2d Sess., pp. 1, 7. Because of Senate opposition to the House amendment (90 Cong. Rec. 9493-9500), the Rivers and Harbors Bill failed of passage during that session of Congress. Early in 1945 the 79th Congress enacted a Rivers and Harbors Bill (act of March 2, 1945, 59 Stat. 10) similar to H.R. 3961, but eliminating several items including the controversial section 4. See S. Rept. 22, 79th Cong., 1st Sess., pp. 1-2; H. Rept. No. 63, 79th Cong., 1st Sess., pp. 1-2; 91 Cong. Rec. 531-532, 1335, 1337.

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At the outset of any discussion of the legislative history of the Flood Control Act of 1944, it must be recognized that both the President and the Secretary of the Interior wished the Isabella and Pine Flat projects to be constructed by the Reclamation Bureau and operated under the reclamation laws.⁶ It is similarly clear that as enacted the Flood Control Act vested construction authority in the Corps of Engineers and to that extent failed to adopt the recommendations of the President and the Secretary of the Interior. This conclusion does not, however, dispose of the question whether the act intended the reclamation laws to apply to the irrigation aspects of the projects, as to which the history of section 8 and the various forms which it took is enlightening.

As introduced and as originally recommended by the House Committee on Flood Control, section 6 (which was later enacted as section 8) of H.R. 4485 provided:

Hereafter, whenever in the opinion of the Secretary of War and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary of War can be consistently used for reclamation of arid lands, it shall be the duty of the Secretary of the Interior to prescribe regulations for the use of the storage available for such purpose, and the operation of any such project shall be in accordance with such regulations. Such rates, as the Secretary of the Interior may deem reasonable, shall be charged for the use of said stored water; the moneys received to be deposited into the Treasury to the credit of miscellaneous receipts.

Describing this provision the House Committee stated:

The construction of multiple-purpose reservoirs is in the public interest. Sound public policy requires not only that flood-control storage be under the supervision of the Secretary of War and the Chief of Engineers but also that storage for the reclamation of arid lands be under the supervision of the Secretary of the Interior.

The committee recognizes that good administration demands that projects be built by the agency having the dominant interest with suitable provisions for safeguarding the interests of other agencies. Accordingly, the bill provides that whenever in the opinion of the Secretary of War and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary of War can be consistently used for reclamation of arid lands, it shall be the duty of the Secretary of the Interior to prescribe regulations for the use of the storage available for such purposes, and the operation of any such project shall be in accordance with such regulation. Such amounts as the Secretary of the Interior may deem reasonable shall be charged for the use

⁶ See, Letters from President Franklin D. Roosevelt to Honorable William M. Whittington, Chairman, House Committee on Flood Control, dated May 5, 1941, and February 7, 1944. Hearings before the Committee on Flood Control, House of Representatives, 78th Cong., 2d Sess., on H.R. 4485, pp. 615-617. See also letter from Secretary of the Interior Ickes to Senator Josiah W. Bailey, Chairman, Senate Committee on Commerce. Hearings before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., on H. R. 4485, pp. 310-314.

of such stored water; the moneys received to be deposited into the Treasury to the credit of miscellaneous receipts. H. Rept. No. 1309, 78th Cong., 2d Sess., p. 8.

Thus at this point in the legislative development of the bill, section 10 provided that the Secretary of War would make arrangements for the payment of conservation storage of water with respect to the Isabella and Pine Flat projects and section 6, as recommended by the committee, would merely have authorized the Secretary of the Interior to prescribe regulations for such use of the stored water. The Secretary of War was to be guided in the exercise of his authority by the regulations issued by the Secretary of the Interior. However, the bill was silent as to whether those regulations were to constitute an application of the reclamation laws, were to be issued without regard to those laws, or whether their applicability was to be left to the Secretary of the Interior's discretion.

The further history of the bill on the floor of the House of Representatives throws light on these questions. Chairman Whittington proposed three amendments which were adopted by the House and which emphasized the applicability of the reclamation laws. 90 Cong. Rec. 4204. The first amendment was to replace the phrase "stored water" in section 6 with the word "storage". Mr. Whittington's explanation of the amendment was as follows:

* * * The section under consideration provides that where there is water for reclamation of arid lands in any reservoir and provision therefor that the distribution of the water shall be by the Secretary of the Interior, the Director of Reclamation will handle the distribution; there was a criticism that this language, which is substantially the reclamation law, undertook to change existing law and required the beneficiaries of reclamation to pay for water. This language in here is the language of the Reclamation Act and they pay only for storage.

The second amendment was to insert the words "Under existing reclamation law" after the authority conferred upon the Secretary of the Interior by section 6 to prescribe regulations for the use of storage. He explained this amendment as follows:

* * * It was asserted that where provision was made in a reservoir where there was water for reclamation that the Commissioner of Reclamation should have the power to prescribe regulations *ad libitum* without regard to existing law. This is merely a perfecting amendment. This amendment provides that these regulations shall be under existing reclamation law. It is a perfecting amendment.

Finally, Mr. Whittington proposed a proviso similar to that which was ultimately enacted as part of section 8 to the effect "That this section shall not apply to any dam or reservoir *heretofore* constructed which supplements any existing locally operated irrigation district." [*Italics supplied.*] This amendment was explained as follows:

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* * * At one or two reservoirs at least provision is made for the water for lands that are not presently under the Director of Reclamation in districts where the local interests have constructed their own canals and their own distribution system. The purpose of this amendment is to limit the provisions of this act so that they shall not apply to districts with canals and distribution facilities that have already been paid for and constructed by local interests.

While Mr. Whittington did not emphasize the limitation, it is significant that the proviso was limited to dams or reservoirs "heretofore constructed", since the Isabella and Pine Flat projects were at this time merely proposals.

The changes made in section 6 as it passed the House provided strong support for the view that the reclamation laws were intended to apply to the irrigation uses of any project authorized by the Flood Control Act, and the Secretary of the Interior took that position in his letter of June 2, 1944, to Senator Bailey. He stated:

* * * I regard section 6 of the bill as intended to provide for the application of the Federal reclamation laws to projects having irrigation possibilities. * * *. However, the provisions of this section are not entirely apt in their relation to the various technical features of the Federal reclamation laws. For this reason, I would much prefer to have the section read substantially in accord with the following proposed amendment: * * *.

He thereupon proposed a substitute section, the first and third sentences of which were substantially similar to section 8 as it was ultimately enacted. It differed from that section primarily in that the second sentence did not require specific Congressional authorization for the construction by the Secretary of the Interior of additional irrigation works. The Senate Committee thereafter recommended that section 6, now to be numbered section 8 because of other Senate Committee amendments, be amended substantially as proposed by the Secretary of the Interior. However the Committee inserted in the second sentence the requirement of subsequent Congressional authorization for any additional works constructed by the Secretary and incorporated a proviso similar to that proposed by Congressman Whittington relating to works "heretofore constructed." The Committee stated:

During the hearings and also by letter the Secretary of the Interior expressed to the committee his views with regard to the utilization of multiple purpose projects under the control of the War Department where irrigation may be involved and he expressed the view that the language of H.R. 4485, if modified, would provide for more effective administration in relation to the various technical features of the Federal reclamation laws. The committee therefore recommends the adoption of amendment No. 10 which is generally in accord

Hearings before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., on H.R. 4485, p. 313.

with existing law and the expressed views of the Secretary of the Interior. [S. Rept. No. 1030, 78th Cong., 2d Sess., p. 4.]

This was the form in which the bill was finally enacted.

During the course of the debate in the Senate, Senator O'Mahoney together with certain other Senators proposed a number of amendments to the bill. Included among them was a new section 6 which would have expressly conferred upon the Secretary of War authority "to contract for water storage for any beneficial uses or purposes." Senator O'Mahoney described the amendment to be "intended as an authorization to the Secretary of War to make contracts for the use of surplus water stored in dams which would be constructed solely by the Army Engineers," and stated that irrigation uses were among those as to which this amendment would confer contractual authority upon the Secretary of War. 90 Cong. Rec. 8548. Another proposal included among Senator O'Mahoney's amendments was a revision of section 8 to read substantially in its present form but which would have expressly provided that the section:

* * * shall not apply to any dam or reservoir heretofore or hereafter constructed which supplements any existing locally operated irrigation system or other locally operated water facilities, * * * [*ibid.*, 8550; italics supplied].

Senator Millikan, a co-sponsor of the amendment, explained that the two proposals had

* * * the combined purpose of not subjecting all of the detail of the reclamation law to projects where the Army engineers have a reservoir in the middle of an existing privately owned irrigation system are in independent position to take the water and therefore should not be required to go through all of the incidents of a reclamation project started from grass roots [*ibid.*, 8549].

In a letter to Senator Hill dated November 29, 1944, Secretary Ickes objected strenuously to both proposals on the ground that they would disregard the reclamation laws while placing the Corps of Engineers in the irrigation field. (*Ibid.*, 8545-8546) Instead of being acted upon, the amendments were referred to the Senate Committee on Irrigation and Reclamation. [*Ibid.*, 8550.]

During the course of the debate, Senator Murray introduced an amendment to delete the projects on the Kings and Kern Rivers from the bill [*ibid.*, 8622-8623] and to modify section 8 so that the third sentence would provide that:

Dam [sic] and works authorized by this act may be utilized for irrigation purposes only *in conformity with the provisions of said Federal reclamation laws and this paragraph.* [*Ibid.*, 8618; italics supplied.]

In opposing the Murray amendments, Senator Overton stated:

The able junior Senator from Montana has made considerable comment in reference to the Sacramento and San Joaquin Rivers and the Central Valley,

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in California. The principle to which I have just referred was carried out in respect to the projects contained in the bill which were authorized for those streams. The testimony shows, I think rather conclusively, that the projects herein authorized to be constructed by the Army engineers are ones in which flood control predominates over irrigation. Of course, the Senate will understand that, insofar as irrigation is concerned, all surplus water which can be used for irrigation is turned over to the Department of the Interior, and the method of irrigation and the operation of the irrigation works are under the control of the Department of the Interior. [*Ibid.*, 8625.]

* * * * *
 Mr. President, the Assistant Chief of Engineers, as well as all the engineers who appeared before our committee, stated that they had absolutely no objection whatsoever to the irrigation and power amendments which were suggested by the Secretary of the Interior. They were similar to those suggested by the Senator from Montana, and were subsequently incorporated in the pending bill. The engineers stated that they were perfectly willing to turn over to the Department of the Interior control of the power generated for distribution, and were perfectly willing to turn over to the Bureau of Reclamation the distribution of all surplus water held back by the dams constructed by them, the distribution of which would come under the reclamation law, or would follow whatever method Congress might determine upon. [*Ibid.*, 8626.]

The amendments were rejected [*id.*].

After the passage of H.R. 4485 by the Senate, including the Committee amendment of section 8 [*ibid.*, 8668], the bill went to conference. The House conferees agreed to the Senate amendment (H. Rept. No. 2051, 78th Cong., 2d Sess., p. 2), and the statement of the managers on the part of the House describes the amendment as follows:

This amendment of the Senate replaces section 6 of the House approved bill with certain modified language substantially as requested by the Secretary of the Interior and constitutes section 8 of the Senate approved bill. The Senate language will provide for more effective administration in relation to the various technical features of the Federal reclamation law. It establishes a procedure for the utilization of multiple-purpose projects for irrigation purposes when the Secretary of War determines upon recommendations of the Secretary of the Interior that a project operated under the direction of the Secretary of War may be utilized for irrigation purposes. [*Ibid.*, p. 7.]

When the bill returned from conference the following colloquy took place on the floor of the Senate:

Mr. HILL. There still seems to be confusion on the part of some Senators with reference to the application of reclamation laws in regard to some of these projects.

I heard the distinguished senior Senator from Louisiana, when the bill was under consideration, and I think he made it very clear. However, I wish to ask this question: Is it not a fact that section 8 of this bill, as agreed to in conference, makes some reclamation laws applicable to the handling of irrigation water of any of the projects, including California projects, where it is found that irrigation may be carried out? I ask the Senator in charge of the bill whether

It is not a fact that the President wanted the California projects in this bill constructed under the Bureau of Reclamation so that the water policies would conform to reclamation laws?

Mr. OVERTON. The Senator is correct with respect to the projects in the so-called Central Valley of California. The President wrote me and the chairman of the subcommittee in this regard. However, in view of the fact that the Senate amendment made not only the California projects but all such projects subject to irrigation laws, and in view of the fact that the House concurred in this action by agreeing to section 8 of the Senate bill, I am sure that the President will feel that we have met the problem that he raised. Section 8 of the bill clearly places reclamation uses of water from these projects under the Secretary of the Interior and under the applicable reclamation laws. No project in this bill which may include irrigation features is exempted from the reclamation laws.

Mr. HILL. I thank the Senator.

Mr. OVERTON. The Senate amendment made not only the California projects, but all such projects subject to the irrigation law. In view of the fact the House concurred in that action by agreeing to section 8 of the bill, I am sure the Senator from Alabama will feel that we have met the question which he has raised. As I stated a while ago, section 8 of the bill clearly places reclamation uses of waters from all projects authorized in this bill under the Secretary of the Interior, and under the applicable reclamation laws. [90 Cong. Rec. 9264.]

The foregoing discussion of the legislative history of the bill clearly indicates that while the President and the Secretary of the Interior were unsuccessful in their efforts to have the projects here discussed constructed by the Bureau of Reclamation, they were able to impress upon the Congress their views that the irrigation uses of any waters made available by these projects should be made subject to the reclamation laws. This also appears to have been the view expressed by the chairman of the House Committee which considered the matter when he explained his amendments. The change in the language of section 8 made by the Senate Committee was apparently intended to dissipate any ambiguities which might exist in this regard. While more apt language could have been used for this purpose, and indeed some was suggested, the intent is clear. Certainly this view of the bill was emphasized by Senator Overton in the course of the debate on the flood control bill.

It is significant that both Senator Overton and Senator Hatch regarded the latter's amendment to section 4 of the Rivers and Harbors Bill so as to make the third sentence refer expressly to the reclamation laws as merely a matter of emphasis which made no change in substance. The discussion of the Murray amendments to the Flood Control Bill were to the same effect.

The interpretation of section 8 as being intended to make the reclamation laws applicable to the projects here considered is also reinforced by the discussion in the Senate of the O'Mahoney amendments.

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It will be recalled that these amendments had as one of their purposes exemption from the reclamation laws of projects in areas where private irrigation systems already existed. At no point in the discussion of those amendments was it ever suggested that this proposal was in fact incorporated in the bill, and the subsequent statements of Senator Overton, made in the course of the discussion of the Murray amendments, are clearly to the contrary.

As suggested earlier, the provisions of section 10 conferring authority upon the Secretary of War to make arrangements for payment for conservation storage with respect to Pine Flats and Isabella can be contended to carry the implication that the reclamation laws are not to apply to irrigation benefits provided by those projects. However, this is at best an implication, and the section does not expressly preclude the application of the reclamation laws. On the other hand, section 8, read in the light of its legislative history, appears to me to require their application. It has been stated that "In construing any statute the legislative intent, if it can be ascertained, must control; and in arriving at the legislative intent the entire statute, its form, its several parts, its purposes, its relation to other statutes, and the effect of construing it one way or another, must be considered." 39 Op. A.G. 42, 44 (1937). Indeed, these principles were applied by my immediate predecessor in connection with the construction of another section of the Flood Control Act of 1944. 41 Op. A.G. No. 36, p. 9 (July 15, 1955). To the same effect, the Supreme Court has said:

In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. [*United States v. American Trucking Associations*, 310 U.S. 534, 542.]

The legislative history of the Flood Control Act of 1944 and its structure impel me to the conclusion that the provisions of section 8, interpreted as suggested above, rather than whatever may be implied from the terms of section 10 should determine whether the reclamation laws should apply to irrigation benefits made available by the Isabella and Pine Flat projects. In reaching this conclusion, I am impressed by the fact that section 10 is basically an enumeration of over 90 projects which are authorized by the act. The dispute over whether the Bureau of Reclamation or the Corps of Engineers was to construct the projects here involved was resolved by their inclusion in section 10. After that issue was resolved, the question of the applicability of the reclamation laws was largely discussed in connection with section 8 as it evolved. The expression of intention that the reclamation laws apply to projects such as are here involved appears too strongly in the

legislative history of section 8 to permit its frustration by virtue of any implication which might be drawn from section 10.

For these reasons, I conclude that section 8 makes the reclamation laws applicable to contracts for the disposition of irrigation benefits from dams and reservoirs constructed under the authority of section 10, even if no additional works are required to be constructed in order to make such irrigation benefits available.

Sincerely,

WILLIAM P. ROGERS,
Attorney General.

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3. If when an entry impressed with a mineral reservation under the act of March 8, 1922 (42 Stat. 415; 48 U.S.C. secs. 376, 377), is ready for patent, the current report of the Geological Survey is that the lands

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HOMESTEADS—Continued

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- have no value or prospective value for the mineral reserved and there is then an outstanding mineral lease or permit, the patent maybe issued without the mineral reservation but excepting from the lands being patented the mineral covered by the lease or permit, the exception to be effective only so long as the lease or permit and rights thereunder exist----- 39
4. So far as the mineral reservation provisions of the act of March 8, 1922 (42 Stat. 415; 48 U.S.C. secs. 376, 377), are concerned, it is immaterial whether a mineral lease application or permit application was filed prior or subsequent to the filing of a homestead application or to the initiation of a settlement claim, conflicting with the mineral application. Priority determines whether the last paragraph of 43 CFR 66.2(b) or 43 CFR 66.6 applies----- 39
5. The act of March 8, 1922 (42 Stat. 415; 48 U.S.C. secs. 376, 377), is applicable to homestead applications, settlement claims, or entries where the lands covered thereby are reported by the Geological Survey as either valuable, or prospectively valuable for coal, oil or gas.----- 39
6. The act of March 8, 1922 (42 Stat. 415; 48 U.S.C. secs. 376, 377), constitutes an extension to the Territory of Alaska of the principles of the surface homestead acts in force in the public land States, namely, the acts of March 3, 1909 (35 Stat. 844; 30 U.S.C. sec. 81), June 22, 1910 (36 Stat. 583; 30 U.S.C. secs. 83-85), and July 17, 1914 (38 Stat. 509; 30 U.S.C. secs. 121-123). Therefore, the procedure set out in 43 CFR 66 and 43 CFR 102.22 should be followed----- 39
7. The applicant's, settler's or entryman's consent is required before a homestead application, settlement claim, or entry, respectively, may be impressed with a mineral reservation under the act of March 8, 1922 (42 Stat. 415; 48 U.S.C. secs. 376, 377)----- 39
8. The words "before the date of issuance of a final certificate" in the act of March 8, 1922 (42 Stat. 415; 48 U.S.C. secs. 376, 377), should be construed to mean "before the date of earning of equitable title"----- 39

MINERAL LEASES AND PERMITS

9. A mineral lease or permit may not be issued unless and until a homestead application, settlement claim, or entry for the same land is impressed with a reservation under the act of March 8, 1922 (42 Stat. 415; 48 U.S.C. secs. 376, 377), of the mineral covered by the lease application or permit application----- 39

OIL AND GAS LEASES

10. The rental rates applicable to lands added to noncompetitive oil and gas leases, applications, or offers in Alaska upon the exercise of the preference right granted under the act of July 3, 1958 (72 Stat. 322), to have included therein the lands beneath nontidal navigable waters embraced therein are the same as those applicable to the other lands covered by such lease, application, or offer. Upon the addition of such lands to outstanding leases pursuant to the act all the other terms and provisions thereof, including the lease term and anniversary date, are thereafter applicable to the preference right acreage----- 313

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11. In order to be entitled to a patent for land purchased under the Alaska Public Sales Act (48 U.S.C., 1952 ed., secs. 364a-364e), a purchaser need show only substantial compliance, not complete compliance, with his land utilization program..... 214
12. In proceedings under Private Law 654 (84th Cong., 2d sess.) [70 stat. A67] purchasers of land under the Alaska Public Sales Act who have paid the full purchase price for the land and who assert that they have performed the requirements for receiving patents on the land will be granted a hearing on the question whether they have complied with those requirements..... 214
13. Where no time for beginning or completion of structures is stated in approved plans of proposed use of land purchased under the Alaska Public Sales Act (48 U.S.C., 1952 ed., secs. 364a-364e), the determination as to what building program was required is dependent upon what reasonably could have been completed during the 3 years following issuance of the certificates of purchase, considering such factors as physical conditions attending building and the finances of the purchaser..... 214

APPLICATIONS AND ENTRIES**AMENDMENTS**

1. By departmental regulation entries which are void *ab initio* are not subject to adjustment or amendment under section 2372 of the Revised Statutes, as amended..... 284

FILING

2. An application for a 5-year extension of an oil and gas lease which is filed after the close of the published office hours of a land office on the last day of the lease term is not timely filed..... 12

APPROPRIATIONS

1. The statutes have been construed administratively and by the Congress in appropriating funds and authorizing projects as permitting the Interior Department to conduct project investigations for one or more multiple purposes either related or not directly related to irrigation..... 129

BUREAU OF LAND MANAGEMENT

1. It is proper for the Eastern States Office of the Bureau of Land Management, on its own motion, to reconsider its decisions prior to an appeal to the Director, even though there are adverse rights present..... 257

BUREAU OF MINES

1. The Bureau of Mines, pursuant to section 5 of the act of May 16, 1910, as amended (36 Stat. 369; 30 U.S.C. sec. 7), and sec. 212(a) of the Federal Coal Mine Safety Act (66 Stat. 692, 709; 30 U.S.C. sec. 482(a)), has the authority to revise existing regulations or to promulgate new regulations affecting equipment in gassy coal mines whether previously certified as permissible or not, provided, (1) the regulations affect equipment acquired and certified as permissible subsequent to July 16, 1952, and not excluded by the provisions of section 209(f)(1) of the Federal Coal Mine Safety Act; (2) a find-

BUREAU OF MINES—Continued

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ing and determination is made by the Bureau based on facts and circumstances; not conclusions that the equipment is not experimental but is a demonstrated safety device designed to decrease or eliminate mine fires and explosions caused by the use of such equipment in gassy coal mines; and (3) that the provisions of the Administrative Procedure Act (5 U.S.C. secs. 1001-1011) are followed.....

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BUREAU OF RECLAMATION**AUTHORIZATION**

1. The Secretary of the Interior is charged with the responsibility, under section 8 of the Flood Control Act of 1944, for the repayment of allocations to irrigation functions of dam and reservoir projects operated under the direction of the Secretary of the Army.....
2. The foregoing [see 1, above] responsibility exists whether or not additional facilities are required for irrigation functions at such dam or reservoir projects.....

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INVESTIGATIONS

3. Section 2 of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U.S.C. sec. 391), section 9 of the Reclamation Project Act of August 4, 1939 (53 Stat. 1187; 43 U.S.C. sec. 485), the Flood Control Act of December 22, 1944 (58 Stat. 887), and intermediate legislation have been considered as authority for the investigation of works having physical and functional purposes either related or not directly related to irrigation.....

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REPAYMENT AND WATER SERVICE CONTRACTS

4. The foregoing [see 1, above] responsibility requires negotiation of appropriate repayment contracts with waterusers for repayment of appropriate allocations to irrigation functions.....

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CONTRACTS(See also *Rules of Practice*.)**ACTS OF GOVERNMENT**

1. A provision imposing liquidated damages for delay in shipment, contained in a contract for the delivery of pumping equipment to be used for irrigation purposes, is not rendered unenforceable as a penalty merely because the Government after the making of the contract defers the construction of the pumping station in which the equipment is to be installed, or merely because the Government informs the contractor of this deferment prior to the shipment, date specified in the contract, or merely because favorable rainfall conditions avert the crop losses contemplated when the contract was made, so that no harm results from the delay in shipment.....
2. A contractor is not entitled to an extension of time for performance on the ground that the Government required the installation of a different type of pump than that designated in the specifications when there is no showing that either type of pump, the delivery of which would have required from 60 to 90 days, would have arrived on the job at the time of its contemplated installation.....

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CONTRACTS—Continued**ADDITIONAL COMPENSATION**

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3. When the Government ordered a supply of copper tubing which was to be used in the fabrication of heat exchangers, and the straightness of the tubes was of "paramount" importance but the specifications, although they included straightness among the characteristics of workmanship, failed to specify a tolerance for straightness, the supplier was entitled to additional compensation for straightening the tubing after delivery in order to meet the Government's requirement for straightness, which allowed a tolerance of only one hundredth of an inch per foot. ----- 173
4. When a contracting officer erroneously construes the terms of a contract, with the result that the contractor is asked to supply cable and conduit not required by the contract, the contractor is entitled to additional compensation for such materials. ----- 203
5. After the occurrence of a storm, which damaged an excavation for anchors and footing for spillway 30-ton cableway, the contracting officer allowed the contractor an option in performing the necessary repair work between placing concrete to the limits of the excavation or forming to the neat line of the structure, in addition to requiring him to clean out the excavation. The contractor conceded his obligation to remove the materials that had sloughed into the excavation but contended that it could not be required to re-excavate beyond the neat lines or to place concrete fill in this area. Although the specifications required excavation to be made only to the neat lines of the structures, and it was contemplated that forming would be necessary only above ground levels, the repair of storm damage is not generally regarded as extra work, even though it is not contemplated by the specifications, and hence the contractor was not entitled to additional compensation unless it could show that the contracting officer, in allowing it a choice only between two alternatives prevented it from adopting still another method which was reasonably adapted to the requirements of the situation and which would have been less expensive than either of the two methods which were allowed. It is immaterial that the cost of repairing the storm damage was disproportionate, or that the work to be performed under the contract was limited to foundation work. ----- 238
6. Despite the fact that a dike, which was constructed across a marsh by the contractor, was not constructed entirely in accordance with the method contemplated by the specifications, the contractor is not entitled to an equitable adjustment under the "changes" clause of the standard form of Government construction contracts, when the change in the method of construction was suggested by the contractor rather than by the contracting officer, and the contractor made the suggestion without requesting a change order, such work being voluntary work rather than a change in the technical sense. Moreover, if the method of construction adopted actually mitigated the difficulties of the contractor, arising from the continuous subsidence of the core of the dike in the marsh, any equitable adjustment would have to be made downwards rather than upwards. The contractor also could not claim that the sequence of operations contemplated by the specifications—placing fill, grading fill and

CONTRACTS—Continued

ADDITIONAL COMPENSATION—Continued

placing topping material—was infeasible when it did not itself follow such sequence, and the officers of the Government did not attempt to interfere with the sequence of operations actually adopted by the contractor-----

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APPEALS

7. When the Board of Contract Appeals held in disposing of an appeal that the obligation of a contractor to restore a wasteway structure damaged by a storm was limited to establishing only so much of "the former earth surfaces" as would be reasonably necessary to admit of the restoration and completion of the wasteway structure, the extent of the obligation of the contractor was not limited to work within the pay or neat lines, since the Board also held that the contractor was required to fill eroded areas to the extent necessary for the restoration and completion of the contract work-----
8. A factual statement by a contractor in a notice of appeal is a mere allegation of what the contractor asserts to be the facts, and, if disputed by the Government, cannot be accepted as proof that the facts so asserted are true-----
9. In an appeal attacking the validity of a finding of fact or decision by a contracting officer, not patently erroneous, it is incumbent upon a contractor who advances a claim against the Government that was denied by such finding or decision to come forward with evidence showing error therein, and in the absence of such evidence the Board of Contract Appeals cannot properly overrule the decision of the contracting officer. In such a case the burden of the appeal is upon the contractor's shoulders, and that burden calls for evidence on the contractor's side to show that the action taken by the contracting officer was erroneous, for the findings of a contracting officer are presumed to be correct in the absence of proof to the contrary-----
10. A contractor who seeks an extension of time under a standard form construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract, that it delayed the orderly progress or ultimate completion of the contract work as a whole, and that it did so for a given period of time-----
11. The fact that an appellant, who was seeking, while its appeal was pending before the Board of Contract Appeals, the settlement on the administrative level of a dispute arising from the performance of its contract for the construction of a dike across a marsh did not specifically consent that the Administrative Assistant Secretary of the Department submit the questions of law involved in the dispute to the Comptroller General for his opinion does not make the pronouncements of the Comptroller General on these questions of law any the less binding on the Board, for the power of the Department to request the Comptroller General's opinion did not depend on the consent of the appellant, and the Board is bound by the opinion of the Comptroller General on the questions of law duly determined by him. However, the opinion of the Comptroller Gen-

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CONTRACTS—Continued**APPEALS—Continued**

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eral was rendered on an assumed state of facts, and the Board is not barred from deciding disputed questions, whether of fact or of law, that were not considered or determined by the Comptroller General.....

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BIDS**Generally**

12. When, through clerical error, the continuation sheet make-up of an invitation to bid for the supply of substation equipment and steel framework left doubt as to whether references therein to potheads, cable and conduit were intended to constitute a single subitem or three separate subitems, and the bidder, although on the continuation sheets it expressly excluded only potheads, nevertheless incorporated in the specifications that accompanied its bid an express exclusion of potheads, cable and conduit, the contract resulting from acceptance of the bid must be interpreted as not embracing any of these three categories of materials, even though the acceptance of the bid mentions only potheads as being excluded..... 203
13. A claim of a contractor for an extension of time based on the theory that the Government was obligated to notify it immediately of the award of the contract must be rejected when under the terms of the bid form the Government was allowed 60 days to accept or reject the bid, and notification was given long before the expiration of this period. Moreover, since bids are opened publicly, the contractor could readily have ascertained whether it was the successful bidder..... 342

Mistakes

14. When a supplier maintains that by excluding potheads from its bid it also intended to exclude cable and conduit but that it was misled in conveying its intention by an ambiguity in the form of the invitation, its appeal from a decision of the contracting officer, which was that the supplier was obligated to furnish the cable and conduit, presents an issue of the interpretation of the bid rather than one of mistake in bid. The circumstances of the bid also involve perhaps an issue whether a valid contract at all was made. The interpretation of a bid is a question of law which is within the jurisdiction of the Board..... 45

BREACH

15. A claim for additional compensation because of alleged tackiness, incorrect numbering, and poor legibility of aperture cards furnished by the Government to a supply contractor under a contract providing for the establishment of an index of the public land records of the United States that contains "changes" and "extras" articles, but no "changed conditions" article, constitutes a claim for unliquidated damages for breach of contract or misrepresentation, rather than a claim based upon a change in or an addition to the contract, and, therefore, is beyond the jurisdiction of the Board of Contract Appeals to decide..... 120
16. An allegation by a contractor who was awarded a contract for the improvement of the public land records of the United States in the

CONTRACTS—Continued

BREACH—Continued

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State of Utah that before its bid is accepted, the Government possessed sufficient information to infer that the estimated quantities of work were erroneous might form the basis of an action for rescission of the contract or for damage for breach of contract, but not for relief by the Board.....

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CHANGED CONDITIONS

17. A contract in which the quantity of hauled excavation needed to construct the core of a dike across a marsh is estimated, and which includes an "approximate quantities" provision, together with a provision that settlement of the fill below the natural marsh line in varying amounts is expected, cannot be said to contain any definite representation concerning the amount of subsidence to be expected, and hence neither a "change" nor a "changed condition" can be said to have been established merely by showing that the estimated quantities of work had been substantially increased by the contracting officer by an order denominated a "change order".....
18. Assuming for the sake of argument that such a negative form of misrepresentation as the entire withholding of available information by the Government may form the basis of a claim of a changed condition, a contractor engaged in constructing a dike in a marsh cannot be said to have established such a claim merely by showing that the Government had taken soundings in the marsh more than a decade and a half before the letting of the contract but failed to reveal the record of the soundings to bidders, in the absence of proof that the dike was constructed at the same location where the soundings had been taken and that the soundings would still have been useful.....
19. That a condition encountered by a contractor who constructed a dike across a marsh was a "changed condition" within the meaning of the second category of such conditions, which comprises unanticipated conditions, cannot be established merely by showing that the contracting officer himself characterized the amount of subsidence of the core of the dike in the marsh as "excessive".....

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CHANGES AND EXTRAS

20. In putting in compacted backfill, in order to restore and complete a wasteway structure damaged by a storm, the contractor was performing "extra work" rather than "compacting backfill about structures" and hence was to be paid in accordance with the provisions of the specifications governing extra work, which were that the contractor be paid "the actual necessary cost" of such work, plus an allowance of 10 percent "for superintendence, general expense, and profit." In the absence of proof to the contrary, the Board must assume that the contracting officer took into consideration, in determining the unit price of the compacted backfill, the factor of a certain amount of hand tamping, in addition to repeated passage of the equipment, in compacting the backfill.....
21. A claim for additional compensation because of alleged tackiness, incorrect numbering, and poor legibility of aperture cards furnished by the Government to a supply contractor under a contract

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providing for the establishment of an index of the public land records of the United States that contains "changes" and "extras" articles, but no "changed conditions" article, constitutes a claim for unliquidated damages for breach of contract or misrepresentation, rather than a claim based upon a change in or an addition to the contract, and, therefore, is beyond the jurisdiction of the Board of Contract Appeals to decide.

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22. After the occurrence of a storm, which damaged an excavation for anchors and footing for spillway 30-ton cableway, the contracting officer allowed the contractor an option in performing the necessary repair work between placing concrete to the limits of the excavation or forming to the neat line of the structure, in addition to requiring him to clean out the excavation. The contractor conceded his obligation to remove the materials that had sloughed into the excavation but contended that it could not be required to re-excavate beyond the neat lines or to place concrete fill in this area. Although the specifications required excavation to be made only to the neat lines of the structures, and it was contemplated that forming would be necessary only above ground levels, the repair of storm damage is not generally regarded as extra work, even though it is not contemplated by the specifications, and hence the contractor was not entitled to additional compensation unless it could show that the contracting officer, in allowing it a choice only between two alternatives prevented it from adopting still another method which was reasonably adapted to the requirements of the situation and which would have been less expensive than either of the two methods which were allowed. It is immaterial that the cost of repairing the storm damage was disproportionate, or that the work to be performed under the contract was limited to foundation work.

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23. A contract in which the quantity of hauled excavation needed to construct the core of a dike across a marsh is estimated, and which includes an "approximate quantities" provision, together with a provision that settlement of the fill below the natural marsh line in varying amounts is expected, cannot be said to contain any definite representation concerning the amount of subsidence to be expected, and hence neither a "change" nor a "changed condition" can be said to have been established merely by showing that the estimated quantities of work had been substantially increased by the contracting officer by an order denominated a "change order".

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24. Despite the fact that a dike, which was constructed across a marsh by the contractor, was not constructed entirely in accordance with the method contemplated by the specifications, the contractor is not entitled to an equitable adjustment under the "changes" clause of the standard form of Government construction contracts, when the change in the method of construction was suggested by the contractor rather than by the contracting officer, and the contractor made the suggestion without requesting a change order, such work being voluntary work rather than a change in the technical sense. Moreover, if the method of construction adopted actually mitigated the difficulties of the contractor, arising from

CONTRACTS—Continued

CHANGES AND EXTRAS—Continued

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the continuous subsidence of the core of the dike in the marsh, any equitable adjustment would have to be made downward rather than upward. The contractor also could not claim that the sequence of operations contemplated by the specifications—placing fill, grading fill and placing topping material—was infeasible when it did not itself follow such sequence, and the officers of the Government did not attempt to interfere with the sequence of operations actually adopted by the contractor.....

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COMPTROLLER GENERAL

25. The fact that an appellant, who was seeking, while its appeal was pending before the Board of Contract Appeals, the settlement on the administrative level of a dispute arising from the performance of its contract for the construction of a dike across a marsh did not specifically consent that the Administrative Assistant Secretary of the Department submit the questions of law involved in the dispute to the Comptroller General for his opinion does not make the pronouncements of the Comptroller General on these questions of law any the less binding on the Board, for the power of the Department to request the Comptroller General's opinion did not depend on the consent of the appellant, and the Board is bound by the opinion of the Comptroller General on the questions of law duly determined by him. However, the opinion of the Comptroller General was rendered on an assumed state of facts, and the Board is not barred from deciding disputed questions, whether of fact or of law, that were not considered or determined by the Comptroller General.....

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CONTRACTING OFFICER

26. After the occurrence of a storm, which damaged an excavation for anchors and footing for spillway 30-ton cableway, the contracting officer allowed the contractor an option in performing the necessary repair work between placing concrete to the limits of the excavation or forming to the neat line of the structure, in addition to requiring him to clean out the excavation. The contractor conceded his obligation to remove the materials that had sloughed into the excavation but contended that it could not be required to re-excavate beyond the neat lines or to place concrete fill in this area. Although the specifications required excavation to be made only to the neat lines of the structures, and it was contemplated that forming would be necessary only above ground levels, the repair of storm damage is not generally regarded as extra work, even though it is not contemplated by the specifications, and hence the contractor was not entitled to additional compensation unless it could show that the contracting officer, in allowing it a choice only between two alternatives prevented it from adopting still another method which was reasonably adapted to the requirements of the situation and which would have been less expensive than either of the two methods which were allowed. It is immaterial that the cost of repairing the storm damage was disproportionate, or that the work to be performed under the contract was limited to foundation work.....
27. When a contractor who was seeking an extension of time for the performance of a contract claimed that the cause of delay in completion

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was attributable to the conduct of an inspector who had died before the completion of the contract and that he had been dissuaded from notifying the contracting officer of the cause of the delay by the assurance of the inspector that he would be granted an extension of time, the Board will not disturb the decision of the contracting officer that an extension of time should be denied because of the failure of the contractor to give written notice of the cause of the delay in the absence of proof that the merits of the claim could still be ascertained and that the inspector gave the assurance claimed.....

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28. Under a contract which empowers the contracting officer to suspend the work when the weather is unsuitable, or conditions are unfavorable for its suitable prosecution, the action of the contracting officer in fixing the date on which a suspension is to begin or end does not preclude the retroactive allowance of extensions of time for a period immediately preceding or following the date so fixed, if during such period no real progress on the contract work was achieved by reason of weather conditions that clearly were unsuitable or unfavorable..

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DAMAGES**Generally**

29. Under a contract for the clearing of a transmission line right-of-way within a national forest which provides that the contractor shall pay "suppression costs and damages resulting from any fires caused by his operations," a claim by the Government for payment of such costs and damages is allowable when the fact that the fire was caused by the contractor's operations is established by a preponderance of the evidence. Evidence showing that the fire started at a place where smoking would have been particularly dangerous and would probably have resulted in the immediate discharge of an employee detected in so doing, that a group of the contractor's employees ate lunch extremely close to this place within approximately 30 minutes before the discovery of the fire, that one of these employees was an habitual smoker, that following the lunch period this employee had a clear opportunity for undetected smoking at the place where the fire started, that the possibility of the fire having been started by occurrences other than smoking was remote, that the possibility of persons other than the contractor's employees having been sufficiently close in point of time and distance to have started the fire was likewise remote, and that the employee who was an habitual smoker had not denied that he did smoke during or after the lunch period, but, in statements made shortly after the fire, had asserted that, while he was aware of the hazards of smoking in the woods and took precautions against fire whenever he did so, he could not remember whether he had smoked on this occasion, is sufficient to establish that the fire was caused by carelessness on the part of one of the contractor's employees.....

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Liquidated Damages

30. A provision imposing liquidated damages for delay in shipment, contained in a contract for the delivery of pumping equipment to be used for irrigation purposes, is not rendered unenforceable as a penalty merely because the Government after the making of the

CONTRACTS—Continued

DAMAGES—Continued

Liquidated Damages—Continued

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| <p>contract defers the construction of the pumping station in which the equipment is to be installed, or merely because the Government informs the contractor of this deferment prior to the shipment date specified in the contract, or merely because favorable rainfall conditions avert the crop losses contemplated when the contract was made, so that no harm results from the delay in shipment.</p> <p>31. A contract for the delivery of pumping equipment for irrigation purposes which expressly states that liquidated damages will be assessed for each day of delay beyond the time for shipment specified in the contract, and which contains other expressions indicative of an intent to impose liquidated damages for any delay beyond the specified shipment date, but which describes the contemplated possible losses as being crop and other losses resulting from "a delay in the installation of the equipment," is to be interpreted as imposing liquidated damages for each day by which shipment is later than the specified shipment date, even though the equipment is received before it is actually needed for installation.</p> <p>32. Where a supply contractor under a contract for the furnishing of motor-driven pumping units failed to submit for Government approval within the time prescribed by the contract the assembly and construction drawings and design data for the motors; delayed placing its order for the motors with its supplier until after the prescribed time for submission of the drawings and design data; failed to call the supplier's attention to the deadlines; after receiving the drawings from its supplier delayed submitting them to the Government, and failed to show that production of the motors by the supplier was delayed by an act of the Government, the contractor has not met the burden of proving that it is entitled to an additional extension of time based on an excusable delay under the delays-damages clause.</p> | <p>Page</p> <p>321</p> <p>321</p> <p>382</p> |
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Unliquidated Damages

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| <p>33. A claim for additional compensation because of alleged tackiness, incorrect numbering, and poor legibility of aperture cards furnished by the Government to a supply contractor under a contract providing for the establishment of an index of the public land records of the United States that contains "changes" and "extras" articles, but no "changed conditions" article, constitutes a claim for unliquidated damages for breach of contract or misrepresentation, rather than a claim based upon a change in or an addition to the contract, and, therefore, is beyond the jurisdiction of the Board of Contract Appeals to decide.</p> | <p>120</p> |
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DELAYS OF CONTRACTOR

34. When a contractor who was seeking an extension of time for the performance of a contract claimed that the cause of delay in completion was attributable to the conduct of an inspector who had died before the completion of the contract and that he had been dissuaded from notifying the contracting officer of the cause of the delay by the assurance of the inspector that he would be granted an extension of time, the Board will not disturb the decision of the

CONTRACTS—Continued**DELAYS OF CONTRACTOR—Continued**

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- contracting officer that an extension of time should be denied because of the failure of the contractor to give written notice of the cause of the delay in the absence of proof that the merits of the claim could still be ascertained and that the inspector gave the assurance claimed.----- 278
35. Under the standard-form "excusable causes of delay" provision, a delay in delivering equipment is not excusable on the ground that the contractor learned from Government sources of a deferment of the construction of the plant in which the equipment was to be installed, and assumed that by reason of such deferment the Government would not require it to make delivery within the time specified in the contract.----- 321
36. A contractor who is entitled to an extension of time for performance by reason of such an unforeseeable cause as "unusually severe weather" is none the less entitled to such relief, despite the fact that its progress schedule, which it was required by the specifications to furnish to the Government merely for the latter's information, may have indicated that no work was originally scheduled during part of the period when the unusually severe weather occurred.----- 342
37. A claim of a contractor for an extension of time based on delay in securing performance and payment bonds, due to the unexpected liquidation of its bonding company, must be denied, even if it be assumed for the sake of argument that this event was unforeseeable, when it is wholly speculative whether the delay actually made any difference to the contractor. Even if the contractor had been able to obtain the bonds sooner, it does not follow that it would necessarily have been given notice to proceed any earlier than it was given. Moreover, the contractor has not shown that it would have obtained a more favorable performance period if the delay had not occurred.----- 342
38. A contractor who seeks an extension of time under a standard form construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract, that it delayed the orderly progress or ultimate completion of the contract work as a whole, and that it did so for a given period of time.----- 463

DELAYS OF GOVERNMENT

39. A claim of a contractor for an extension of time based on the theory that the Government was obligated to notify it immediately of the award of the contract must be rejected when under the terms of the bid form the Government was allowed 60 days to accept or reject the bid, and notification was given long before the expiration of this period. Moreover, since bids are opened publicly, the contractor could readily have ascertained whether it was the successful bidder.----- 342

INTERPRETATION

40. When a supplier maintains that by excluding potheads from its bid it also intended to exclude cable and conduit but that it was misled in conveying its intention by an ambiguity in the form of the invitation, its appeal from a decision of the contracting officer, which was

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| that the supplier was obligated to furnish the cable and conduit, presents an issue of the interpretation of the bid rather than one of mistake in bid. The circumstances of the bid also involve perhaps an issue whether a valid contract at all was made. The interpretation of a bid is a question of law which is within the jurisdiction of the Board..... | 45 |
| 41. A contractor engaged in the construction of a helium plant, who was expressly required by the terms of the specifications to make "every reasonable effort" to safeguard the plans for the plant and to assure that its employees were loyal Americans, was impliedly required to bear the cost of a security check of its employees to be made by an outside investigative agency..... | 53 |
| 42. Where a contract contains separate unit bid prices for the puddling and for the compaction of backfill, and contains specifications which limit puddling to backfill that is composed of silty material and require compaction for backfill that is composed of sand or gravel, a provision in the contract which authorizes the contracting officer to direct that unsuitable foundation material be removed and replaced with selected material and which states that the puddling or compaction of such refill material shall be paid for at the unit bid price for the puddling or compaction of backfill, as the case may be, is to be interpreted as calling for the compaction, rather than the puddling, of refill material that is composed of sand and gravel.... | 135 |
| 43. When the Government ordered a supply of copper tubing which was to be used in the fabrication of heat exchangers, and the straightness of the tubes was of "paramount" importance but the specifications, although they included straightness among the characteristics of workmanship, failed to specify a tolerance for straightness, the supplier was entitled to additional compensation for straightening the tubing after delivery in order to meet the Government's requirement for straightness, which allowed a tolerance of only one hundredth of an inch per foot..... | 173 |
| 44. When, through clerical error, the continuation sheet make-up of an invitation to bid for the supply of substation equipment and steel framework left doubt as to whether references therein to potheads, cable and conduit were intended to constitute a single subitem or three separate subitems, and the bidder, although on the continuation sheets it expressly excluded only potheads, nevertheless incorporated in the specifications that accompanied its bid an express exclusion of potheads, cable and conduit, the contract resulting from acceptance of the bid must be interpreted as not embracing any of these three categories of materials, even though the acceptance of the bid mentions only potheads as being excluded..... | 203 |
| 45. Under the terms of a supply contract for the improvement of the public land records of the United States in the State of Utah for a lump-sum price which involved the processing of estimated quantities of aperture and cross-reference cards and irregular township plats, but provided that the estimated quantities were subject to a 25 percent increase or decrease, the contractor is entitled to additional compensation only to the extent that the estimated quantities, plus 25 percent, have been exceeded. Such a contract is not | |

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- ambiguous, nor lacking in mutuality, nor can it be said to have been prematurely made because the Government may not have been in a good position to estimate the quantities at the time the contract was made 261
46. A contract for the delivery of pumping equipment for irrigation purposes which expressly states that liquidated damages will be assessed for each day of delay beyond the time for shipment specified in the contract, and which contains other expressions indicative of an intent to impose liquidated damages for any delay beyond the specified shipment date, but which describes the contemplated possible losses as being crop and other losses resulting from "a delay in the installation of the equipment," is to be interpreted as imposing liquidated damages for each day by which shipment is later than the specified shipment date, even though the equipment is received before it is actually needed for installation 321
47. Where a contract requires notice within a specified period, but does not specify the manner in which notice is to be given, the mere mailing of notice is not sufficient unless it is received within the time specified 365
48. When the cancellation procedure prescribed by a lease contract provides that the lessee may request a hearing within a specified period after a day named, the designated day after which the period of time begins to run is not to be included in the computation. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday 365
49. A contractor who is aware of an ambiguity in a Government construction contract with respect to the assembly of individual capacitor units and associated equipment into Var-Blocks is not entitled to the benefit of the rule of interpretation *contra proferentem*, which would require that the provision be construed against the Government which had drafted it. Having discovered the ambiguity, the contractor is bound to make due and proper inquiry in the effort to secure its clarification. The contractor cannot confine the inquiry to the supplier of the capacitor equipment, especially when it has been put on notice that an authoritative interpretation can be obtained only from the main office of the contracting bureau 388
50. A specification provision that payment for material excavated from a borrow pit shall be exclusive of overburden stripped from the pit and that the usable material to be paid for shall be "measured in original position" necessitates a determination of the elevation of the underside of the overburden in its original position before stripping, and is not complied with by a measurement which reflects the size of the whole pit upon completion of all excavation less the volume of the overburden in its position at that time, irrespective of whether or not in such measurement an allowance is made for swelling of the stripped overburden 463
51. Under specifications which provided that the contractor furnish and install in a compacted state gravel bedding for a concrete lining in an irrigation lateral and that the gravel bedding so installed should be measured for payment in the most practicable manner, either to the

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INTERPRETATION—Continued

outlines of the areas covered with gravel bedding and to an average thickness, or in approved vehicles at the point of delivery, the contracting officer had a choice between these two alternative methods of measuring the gravel bedding for payment. Whichever method was chosen; however, payment would have to be made for the gravel in a compacted state, and, if payment were based on loose truck measurements of the gravel, a compaction factor would have to be applied to the gravel so measured. It is apparent that if either method of measuring the gravel for payment presupposed its measurement in a compacted state, the other method must also presuppose this, since both methods, to be equitable must produce equivalent results. The fact that bidders were unable to determine the factor of compaction in advance, since the source of the gravel was subject to the approval of the contracting officer, proves no more than that the contract involved elements of uncertainty or risk for the contractor. Differences of nomenclature to be found in various items of the schedule and specifications with respect to payment do not demonstrate an ambiguity in the provisions for payment of the gravel bedding, since the language was not exactly parallel and the provisions for the performance of the various items differed substantially. The fact that Government inspectors kept a truck count tally of the gravel bedding is not a practical construction requiring payment for the gravel by loose truck measurement, since they reported generally all operations under the contract; the information was useful for other purposes, such as the making of progress payments; and the contracting officer was not bound to determine how the gravel should be paid for until after it had been placed. The contracting officer did not abuse his discretion in paying for the gravel bedding on the basis of cross sections taken prior to the placing thereof, since the record shows that the practice of using cross sections in measuring earthwork for payment is common, and the contractor has failed to bear the burden of proving that there were circumstances that made the use of the cross sections unfair.-----

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NOTICES

52. When a contractor who was seeking an extension of time for the performance of a contract claimed that the cause of delay in completion was attributable to the conduct of an inspector who had died before the completion of the contract and that he had been dissuaded from notifying the contracting officer of the cause of the delay by the assurance of the inspector that he would be granted an extension of time, the Board will not disturb the decision of the contracting officer that an extension of time should be denied because of the failure of the contractor to give written notice of the cause of the delay in the absence of proof that the merits of the claim could still be ascertained and that the inspector gave the assurance claimed.-----
53. A claim of a contractor for an extension of time based on delay in securing performance and payment bonds, due to the unexpected liquidation of its bonding company, must be denied, even if it be assumed for the sake of argument that this event was unforeseeable, when it is wholly speculative whether the delay actually made any

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difference to the contractor. Even if the contractor had been able to obtain the bonds sooner, it does not follow that it would necessarily have been given notice to proceed any earlier than it was given. Moreover, the contractor has not shown that it would have obtained a more favorable performance period if the delay had not occurred.

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54. Where a contract requires notice within a specified period, but does not specify the manner in which notice is to be given, the mere mailing of notice is not sufficient unless it is received within the time specified.

365

PAYMENTS

55. Under a unit-price contract for the excavation of borrow material where the Government fails to comply with the measurement provisions of the contract, and where compliance subsequently becomes impossible, payment for the excavated material is to be made on that basis which is most consistent with the provisions of the contract and the available data of a reliable nature as to the quantities excavated.

463

56. Under specifications which provided that the contractor furnish and install in a compacted state gravel bedding for a concrete lining in an irrigation lateral and that the gravel bedding so installed should be measured for payment in the most practicable manner, either to the outlines of the areas covered with gravel bedding and to an average thickness, or in approved vehicles at the point of delivery, the contracting officer had a choice between these two alternative methods of measuring the gravel bedding for payment. Which-ever method was chosen, however, payment would have to be made for the gravel in a compacted state, and, if payment were based on loose truck measurements of the gravel, a compaction factor would have to be applied to the gravel so measured. It is apparent that if either method of measuring the gravel for payment presupposed its measurement in a compacted state, the other method must also presuppose this, since both methods, to be equitable must produce equivalent results. The fact that bidders were unable to determine the factor of compaction in advance, since the source of the gravel was subject to the approval of the contracting officer, proves no more than that the contract involved elements of uncertainty or risk for the contractor. Differences of nomenclature to be found in various items of the schedule and specifications with respect to payment do not demonstrate an ambiguity in the provisions for payment of the gravel bedding, since the language was not exactly parallel and the provisions for the performance of the various items differed substantially. The fact that Government inspectors kept a truck count tally of the gravel bedding is not a practical construction requiring payment for the gravel by loose truck measurement, since they reported generally all operations under the contract; the information was useful for other purposes, such as the making of progress payments; and the contracting officer was not bound to determine how the gravel should be paid for until after it had been placed. The contracting officer did not

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abuse his discretion in paying for the gravel bedding on the basis of cross sections taken prior to the placing thereof, since the record shows that the practice of using cross sections in measuring earth-work for payment is common, and the contractor has failed to bear the burden of proving that there were circumstances that made the use of the cross sections unfair-----

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PERFORMANCE

57. A contractor engaged in the construction of a helium plant, who was expressly required by the terms of the specifications to make "every reasonable effort" to safeguard the plans for the plant and to assure that its employees were loyal Americans, was impliedly required to bear the cost of a security check of its employees to be made by an outside investigative agency-----

53

58. Notwithstanding the occurrence of a storm which constituted "unusually severe weather" within the meaning of the delays-damages provision of the contract, and which damaged the excavation work of the contractor, it was not entitled to an extension of time for restoring the excavation when during the period when the restoration could have been accomplished, it could have made no progress due to its failure to have delivered to the job site the main anchor beam and erector anchor bar without which concrete could not have been poured. To be entitled to an extension of time the contractor must show not only that an excusable cause of delay occurred but also that it was a factor in the ultimate delay in the completion of the work. The contractor is entitled, however, to an extension of time for 2 days which were required by the contractor to do the extra concrete and form work necessitated by the storm, notwithstanding shortcomings in the concrete work that had to be remedied, since it would undoubtedly have completed all of the concrete work 2 days earlier if the storm had not occurred-----

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59. A contractor is not entitled to an extension of time for performance on the ground that the Government required the installation of a different type of pump than that designated in the specifications when there is no showing that either type of pump, the delivery of which would have required from 60 to 90 days, would have arrived on the job at the time of its contemplated installation-----

342

60. A contractor who is entitled to an extension of time for performance by reason of such an unforeseeable cause as "unusually severe weather" is none the less entitled to such relief, despite the fact that its progress schedule, which it was required by the specifications to furnish to the Government merely for the latter's information, may have indicated that no work was originally scheduled during part of the period when the unusually severe weather occurred-----

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61. A claim of a contractor for an extension of time based on delay in securing performance and payment bonds, due to the unexpected liquidation of its bonding company, must be denied, even if it be assumed for the sake of argument that this event was unforeseeable, when it is wholly speculative whether the delay actually made any difference to the contractor. Even if the contractor had been able to obtain the bonds sooner, it does not follow that it would neces-

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sarily have been given notice to proceed any earlier than it was given. Moreover, the contractor has not shown that it would have obtained a more favorable performance period if the delay had not occurred.

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62. Under a unit-price contract for the excavation of borrow material where the Government fails to comply with the measurement provisions of the contract, and where compliance subsequently becomes impossible, payment for the excavated material is to be made on that basis which is most consistent with the provisions of the contract and the available data of a reliable nature as to the quantities excavated.

463

63. Whatever may be the general scope of a provision in the specifications, empowering the contracting officer to suspend the work when conditions were "unfavorable for the prosecution of the work," it is clear that it cannot be held to extend to a situation that was foreseeable in view of other provisions of the specifications, which warned the contractor of the very same conditions and extended the time of performance by reason thereof.

500

SPECIFICATIONS

64. A contractor engaged in the construction of a helium plant, who was expressly required by the terms of the specifications to make "every reasonable effort" to safeguard the plans for the plant and to assure that its employees were loyal Americans, was impliedly required to bear the cost of a security check of its employees to be made by an outside investigative agency.

53

65. Where a contract contains separate unit bid prices for the puddling and for the compaction of backfill, and contains specifications which limit puddling to backfill that is composed of silty material and require compaction for backfill that is composed of sand or gravel, a provision in the contract which authorizes the contracting officer to direct that unsuitable foundation material be removed and replaced with selected material and which states that the puddling or compaction of such refill material shall be paid for at the unit bid price for the puddling or compaction of backfill, as the case may be, is to be interpreted as calling for the compaction, rather than the puddling, of refill material that is composed of sand and gravel.

135

66. When the Government ordered a supply of copper tubing which was to be used in the fabrication of heat exchangers, and the straightness of the tubes was of "paramount" importance but the specifications, although they included straightness among the characteristics of workmanship, failed to specify a tolerance for straightness, the supplier was entitled to additional compensation for straightening the tubing after delivery in order to meet the Government's requirement for straightness, which allowed a tolerance of only one hundredth of an inch per foot.

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67. After the occurrence of a storm, which damaged an excavation for anchors and footing for spillway 30-ton cableway, the contracting officer allowed the contractor an option in performing the necessary repair work between placing concrete to the limits of the excavation or forming to the neat line of the structure, in addition to requiring

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him to clean out the excavation. The contractor conceded his obligation to remove the materials that had sloughed into the excavation but contended that it could not be required to re-excavate beyond the neat lines or to place concrete fill in this area. Although the specifications required excavation to be made only to the neat lines of the structures, and it was contemplated that forming would be necessary only above ground levels, the repair of storm damage is not generally regarded as extra work, even though it is not contemplated by the specification, and hence the contractor was not entitled to additional compensation unless it could show that the contracting officer, in allowing it a choice only between two alternatives prevented it from adopting still another method which was reasonably adapted to the requirements of the situation and which would have been less expensive than either of the two methods which were allowed. It is immaterial that the cost of repairing the storm damage was disproportionate, or that the work to be performed under the contract was limited to foundation work-----

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68. A contractor is not entitled to an extension of time for performance on the ground that the Government required the installation of a different type of pump than that designated in the specifications when there is no showing that either type of pump, the delivery of which would have required from 60 to 90 days, would have arrived on the job at the time of its contemplated installation-----

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69. A contractor who is entitled to an extension of time for performance by reason of such an unforeseeable cause as "unusually severe weather" is none the less entitled to such relief, despite the fact that its progress schedule, which it was required by the specifications to furnish to the Government merely for the latter's information, may have indicated that no work was originally scheduled during part of the period when the unusually severe weather occurred----

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70. A specification of a Government construction contract which enumerates the individual components of capacitor equipments and requires the contractor to install "the complete capacitor equipments" is not ambiguous, so far as the contractor's duty to assemble the individual capacitor units and associated equipment into Var-Blocks, is concerned-----

388

71. Under specifications which provided that the contractor furnish and install in a compacted state gravel bedding for a concrete lining in an irrigation lateral and that the gravel bedding so installed should be measured for payment in the most practicable manner, either to the outlines of the areas covered with gravel bedding and to an average thickness, or in approved vehicles at the point of delivery, the contracting officer had a choice between these two alternative methods of measuring the gravel bedding for payment. Whichever method was chosen, however, payment would have to be made for the gravel in a compacted state, and, if payment were based on loose truck measurements of the gravel, a compaction factor would have to be applied to the gravel so measured. It is apparent that if either method of measuring the gravel for payment presupposed its measurement in a compacted state, the other method must also presuppose this, since both methods, to be equitable must produce

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equivalent results. The fact that bidders were unable to determine the factor of compaction in advance, since the source of the gravel was subject to the approval of the contracting officer, proves no more than that the contract involved elements of uncertainty or risk for the contractor. Differences of nomenclature to be found in various items of the schedule and specifications with respect to payment do not demonstrate an ambiguity in the provisions for payment of the gravel bedding, since the language was not exactly parallel and the provisions for the performance of the various items differed substantially. The fact that Government inspectors kept a truck count tally of the gravel bedding is not a practical construction requiring payment for the gravel by loose truck measurement, since they reported generally all operations under the contract; the information was useful for other purposes, such as the making of progress payments; and the contracting officer was not bound to determine how the gravel should be paid for until after it had been placed. The contracting officer did not abuse his discretion in paying for the gravel bedding on the basis of cross sections taken prior to the placing thereof, since the record shows that the practice of using cross sections in measuring earthwork for payment is common, and the contractor has failed to bear the burden of proving that there were circumstances that made the use of the cross sections unfair.

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72. A specification provision that payment for material excavated from a borrow pit shall be exclusive of overburden stripped from the pit and that the usable material to be paid for shall be "measured in original position" necessitates a determination of the elevation of the underside of the overburden in its original position before stripping, and is not complied with by a measurement which reflects the size of the whole pit upon completion of all excavation less the volume of the overburden in its position at that time, irrespective of whether or not in such measurement an allowance is made for swelling of the stripped overburden.

463

73. A contract in which the quantity of hauled excavation needed to construct the core of a dike across a marsh is estimated, and which includes an "approximate quantities" provision, together with a provision that settlement of the fill below the natural marsh line in varying amounts is expected, cannot be said to contain any definite representation concerning the amount of subsidence to be expected, and hence neither a "change" nor a "changed condition" can be said to have been established merely by showing that the estimated quantities of work had been substantially increased by the contracting officer by an order denominated a "change order".

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74. Whatever may be the general scope of a provision in the specifications, empowering the contracting officer to suspend the work when conditions were "unfavorable for the prosecution of the work," it is clear that it cannot be held to extend to a situation that was foreseeable in view of other provisions of the specifications, which warned the contractor of the very same conditions and extended the time of performance by reason thereof.

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SUBCONTRACTORS AND SUPPLIERS

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75. The action of a prime contractor in filing a claim with the contracting officer on behalf of a subcontractor does not in itself suffice to ground an appeal to the Board of Contract Appeals that is subsequently taken by the subcontractor alone. A provision in a subcontract making the subcontractor subject to all the terms of the prime contract is insufficient to create privity of contract between the Government and the subcontractor, even though the prime contract provides also that all subcontracts shall be subject to the approval of the contracting officer ----- 274
76. The failure of a contractor's supplier to prepare promptly necessary motor drawings and design data required for the performance of a supply contract would not alone be sufficient to relieve the contractor of a contractual obligation to submit such drawings and design data within the prescribed periods of time, or to constitute an excusable cause of delay ----- 382
77. Where a supply contractor under a contract for the furnishing of motor-driven pumping units failed to submit for Government approval within the time prescribed by the contract the assembly and construction drawings and design data for the motors; delayed placing its order for the motors with its supplier until after the prescribed time for submission of the drawings and design data; failed to call the supplier's attention to the deadlines; after receiving the drawings from its supplier delayed submitting them to the Government, and failed to show that production of the motors by the supplier was delayed by an act of the Government, the contractor has not met the burden of proving that it is entitled to an additional extension of time based on an excusable delay under the delays-damages clause ----- 382

SUBSTANTIAL EVIDENCE

78. A factual statement by a contractor in a notice of appeal is a mere allegation of what the contractor asserts to be the facts, and, if disputed by the Government, cannot be accepted as proof that the facts so asserted are true ----- 135
79. In an appeal attacking the validity of a finding of fact or decision by a contracting officer, not patently erroneous, it is incumbent upon a contractor who advances a claim against the Government that was denied by such finding or decision to come forward with evidence showing error therein, and in the absence of such evidence the Board of Contract Appeals cannot properly overrule the decision of the contracting officer. In such a case the burden of the appeal is upon the contractor's shoulders, and that burden calls for evidence on the contractor's side to show that the action taken by the contracting officer was erroneous, for the findings of a contracting officer are presumed to be correct in the absence of proof to the contrary ----- 135
80. Under a contract for the clearing of a transmission line right-of-way within a national forest which provides that the contractor shall pay "suppression costs and damages resulting from any fires caused by his operations," a claim by the Government for payment of such costs and damages is allowable when the fact that the fire was caused

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by the contractor's operations is established by a preponderance of the evidence. Evidence showing that the fire started at a place where smoking would have been particularly dangerous and would probably have resulted in the immediate discharge of an employee detected in so doing, that a group of the contractor's employees ate lunch extremely close to this place within approximately 30 minutes before the discovery of the fire, that one of these employees was an habitual smoker, that following the lunch period this employee had a clear opportunity for undetected smoking at the place where the fire started, that the possibility of the fire having been started by occurrences other than smoking was remote, that the possibility of persons other than the contractor's employees having been sufficiently close in point of time and distance to have started the fire was likewise remote, and that the employee who was an habitual smoker had not denied that he did smoke during or after the lunch period, but, in statements made shortly after the fire, had asserted that, while he was aware of the hazards of smoking in the woods and took precautions against fire whenever he did so, he could not remember whether he had smoked on this occasion, is sufficient to establish that the fire was caused by carelessness on the part of one of the contractor's employees.....

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81. In a proceeding under the "disputes" clause of a contract where the controversy arises out of a claim by the Government for suppression costs and damages incurred as a result of a fire alleged to have been caused by the contractor's operations; testimony by fire experts, even though they may be personnel of the agency that incurred such costs and damages, with respect to the probable cause of the fire is admissible.....

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SUSPENSION AND TERMINATION

82. Under a contract which empowers the contracting officer to suspend the work when the weather is unsuitable, or conditions are unfavorable for its suitable prosecution, the action of the contracting officer in fixing the date on which a suspension is to begin or end does not preclude the retroactive allowance of extensions of time for a period immediately preceding or following the date so fixed, if during such period no real progress on the contract work was achieved by reason of weather conditions that clearly were unsuitable or unfavorable....
83. Whatever may be the general scope of a provision in the specifications, empowering the contracting officer to suspend the work when conditions were "unfavorable for the prosecution of the work," it is clear that it cannot be held to extend to a situation that was foreseeable in view of other provisions of the specifications, which warned the contractor of the very same conditions and extended the time of performance by reason thereof.....

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UNFORESEEABLE CAUSES

84. Notwithstanding the occurrence of a storm which constituted "unusually severe weather" within the meaning of the delays-damages provision of the contract, and which damaged the excavation work of the contractor, it was not entitled to an extension of time for restoring the excavation when during the period when the restora-

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UNFORESEEABLE CAUSES—Continued

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tion could have been accomplished, it could have made no progress due to its failure to have delivered to the job site the main anchor beam and erector anchor bar without which concrete could not have been poured. To be entitled to an extension of time the contractor must show not only that an excusable cause of delay occurred but also that it was a factor in the ultimate delay in the completion of the work. The contractor is entitled, however, to an extension of time for 2 days which were required by the contractor to do the extra concrete and form work necessitated by the storm, notwithstanding shortcomings in the concrete work that had to be remedied, since it would undoubtedly have completed all of the concrete work 2 days earlier if the storm had not occurred.....	238
85. Under the standard-form "excusable causes of delay" provision, a delay in delivering equipment is not excusable on the ground that the contractor learned from Government sources of a deferment of the construction of the plant in which the equipment was to be installed, and assumed that by reason of such deferment the Government would not require it to make delivery within the time specified in the contract.....	321
86. A claim of a contractor for an extension of time based on the theory that the Government was obligated to notify it immediately of the award of the contract must be rejected when under the terms of the bid form the Government was allowed 60 days to accept or reject the bid, and notification was given long before the expiration of this period. Moreover, since bids are opened publicly, the contractor could readily have ascertained whether it was the successful bidder.....	342
87. A claim of a contractor for an extension of time based on delay in securing performance and payment bonds, due to the unexpected liquidation of its bonding company, must be denied, even if it be assumed for the sake of argument that this event was unforeseeable, when it is wholly speculative whether the delay actually made any difference to the contractor. Even if the contractor had been able to obtain the bonds sooner, it does not follow that it would necessarily have been given notice to proceed any earlier than it was given. Moreover, the contractor has not shown that it would have obtained a more favorable performance period if the delay had not occurred.....	342
88. A contractor is not entitled to an extension of time for performance on the ground that the Government required the installation of a different type of pump than that designated in the specifications when there is no showing that either type of pump, the delivery of which would have required from 60 to 90 days, would have arrived on the job at the time of its contemplated installation.....	342
89. A contractor who is entitled to an extension of time for performance by reason of such an unforeseeable cause as "unusually severe weather" is none the less entitled to such relief, despite the fact that its progress schedule, which it was required by the specifications to furnish to the Government merely for the latter's information, may have indicated that no work was originally scheduled during part of the period when the unusually severe weather occurred.....	342

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90. The contingency that some event of local public interest will cause a temporary increase in traffic on a road under improvement is one so apt to happen that it would normally be allowed for in a road contractor's pre-bid traffic estimate, and, therefore, such an occurrence does not constitute an unforeseeable cause of delay even though the particular event that causes the traffic increase is one which, although annual, has neither a fixed date nor a fixed site... 463
91. A contractor who seeks an extension of time under a standard form construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract, that it delayed the orderly progress or ultimate completion of the contract work as a whole, and that it did so for a given period of time..... 463
92. The unusualness of the weather on a stormy day cannot be determined merely by measuring the severity of the weather on that particular day against the average weather for the same day in prior years, but must be determined on a basis that takes account of the frequency with which days of like or greater severity occurred during the same months or seasons of prior years..... 463
93. When a contractor has established that the weather was "unusually severe" within the meaning of the "delays-damages clause" of the standard form of Government construction contract, it is not disentitled to an extension of time merely because the days claimed are not consecutive and amount to but a small percentage of the contract performance time..... 500

CONVEYANCES**INTEREST CONVEYED**

1. Where the United States quitclaims to private persons the mineral rights (excepting and reserving only coal) in acquired lands on which oil and gas leases are outstanding and the quitclaim deed does not except or reserve to the United States any right or interest as lessor under the oil and gas leases, the Department retains no jurisdiction over the mineral interests covered by the leases and after execution and delivery of the deed, the grantees of the United States become the lessors of the oil and gas leaseholds..... 299

GRAZING LEASES**APPORTIONMENT OF LAND**

1. As between contending applicants for section 15 leases who own contiguous lands, an award must be made to the one who has greater need of the public land to permit proper use of his contiguous land. If only one of the applicants owns adjoining land, an award must be made to him if he needs the public land for proper use of his contiguous land even though another applicant may have a greater need for the public land. If none of the contending applicants owns contiguous land, an award is to be made between them on the basis of such factors as their need for the land and proper range management practices..... 148

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| 2. Where two contending preference-right applicants have not shown that they need the public land applied for in order to enable them to make proper use of their contiguous lands, an award is to be made between them as though they were not preference-right applicants..... | Page
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PREFERENCE RIGHT APPLICANTS

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|--|-----|
| 3. A preference-right applicant for a lease under section 15 of the Taylor Grazing Act must show that he needs the public land applied for to enable him to make proper use of his contiguous land; thus where an applicant owns land contiguous to public land applied for and uses both for summer grazing, he cannot claim a preference right on the ground that he needs the public land to complement his operations on winter lands which are also owned by him but which are not contiguous to the public land..... | 148 |
| 4. As between contending applicants for section 15 leases who own contiguous lands, an award must be made to the one who has greater need of the public land to permit proper use of his contiguous land. If only one of the applicants owns adjoining land, an award must be made to him if he needs the public land for proper use of his contiguous land even though another applicant may have a greater need for the public land. If none of the contending applicants owns contiguous land, an award is to be made between them on the basis of such factors as their need for the land and proper range management practices..... | 148 |
| 5. In order to be entitled to a preference right to a grazing lease under section 15 of the Taylor Grazing Act, one need not be engaged in the livestock business or derive his principal source of income from raising livestock. However, whether one is primarily or exclusively engaged in the livestock business is a factor which can be considered in making an award of leases between two preference-right applicants..... | 148 |
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| 7. Where two contending preference-right applicants have not shown that they need the public land applied for in order to enable them to make proper use of their contiguous lands, an award is to be made between them as though they were not preference-right applicants..... | 148 |

GRAZING PERMITS AND LICENSES

GENERALLY

- | | |
|--|-----|
| 1. Determinations of the carrying capacity of the Federal range within a grazing district, of the commensurability of base property, and of proper seasons of use of the range are within the discretion of the range manager, and his determinations will be accepted where there is no showing of error, discrimination, or arbitrariness..... | 231 |
| 2. Where the renewal of a grazing permit was not denied to an applicant for grazing privileges and there is no evidence that the value of the applicant's grazing unit will be impaired by action taken on his applications, the provision in section 3 of the Taylor Grazing Act | |

GRAZING PERMITS AND LICENSES—Continued**GENERALLY—Continued**

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that no permittee who has complied with the applicable rules and regulations shall be denied the renewal of a grazing permit if such denial will impair the value of his grazing unit has no effect on the award of grazing privileges to which the applicant is entitled.....

231

3. The provision in the Federal Range Code that in the event of failure for 2 consecutive years to offer base in an application for a grazing license or permit, such property will lose its dependency by use or priority will be read independently of and as unaffected by the provision in the code that each year a time will be set before which applications for grazing privileges must be filed and that applications which are not filed on or before that date will be rejected for that year in the absence of a satisfactory showing justifying the late filing.....

409

ADJUDICATION

4. Where, on appeal from a range manager's award of grazing privileges for the 1953 and 1954 seasons, a hearing examiner determined the applicant's class 1 grazing privileges in accordance with the priority period designated in the range code, and thereafter a special rule with respect to the range involved was adopted which rule changed the priority period upon which class 1 privileges were to be determined for the future, the correctness of the hearing examiner's determination becomes moot.....

231

BASE PROPERTY (LAND)**Generally**

5. Base property may be invested with dependency by use by transfer from other property if the application for transfer of base property qualifications presented under section 161.7(b) of the Federal Range Code designates specific property owned or controlled by a transferee with sufficient productivity to support the qualifications to be transferred.....
6. Where grazing rights are acquired in excess of the commensurability of the lands to which such rights are transferred and the transferee thereafter acquires additional base property, the excess grazing rights cannot be attached to the after-acquired lands where the transferee fails within the time allowed him by the range manager to offer such lands in a transfer of such excess rights.....
7. Patented mining claims of sufficient productivity to support base property qualifications may be designated as base property and used to support an application for Federal grazing privileges. Unpatented mining claims cannot be regarded as base property of a Federal range user because in the absence of patent the holder of a mining claim is without right to use the claim for grazing purposes.....

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Dependency by Use

8. The provision in the Federal Range Code that in the event of failure for 2 consecutive years to offer base in an application for a grazing license or permit, such property will lose its dependency by use or priority will be read independently of and as unaffected by the provision in the code that each year a time will be set before which applications

GRAZING PERMITS AND LICENSES—Continued

BASE PROPERTY (LAND)—Continued

Dependency by Use—Continued

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for grazing privileges must be filed and that applications which are not filed on or before that date will be rejected for that year in the absence of a satisfactory showing justifying the late filing-----

409

9. Where an application for grazing privileges is filed within 2 years after the base offered therein was first recognized as having priority, but the application was filed too late to be considered for an award of grazing privileges for the year in which it was filed, the application nonetheless satisfies the requirements of 43 CFR 161.6(c)(9) and prevents loss of priority of the base for failure to offer it in an application for 2 consecutive years-----

409

Ownership or Control

10. Loss of ownership or control of property to which base property qualifications have attached results in the loss of such qualifications in the absence of a proper and timely application for transfer of such qualifications to specific property of sufficient productivity to receive them-----

394

SPECIAL DISTRICT RULES

11. Where, on appeal from a range manager's award of grazing privileges for the 1953 and 1954 seasons, a hearing examiner determined the applicant's class 1 grazing privileges in accordance with the priority period designated in the range code, and thereafter a special rule with respect to the range involved was adopted which rule changed the priority period upon which class 1 privileges were to be determined for the future, the correctness of the hearing examiner's determination becomes moot-----

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GUAM

GENERALLY

1. Abutting upland property owners may not assert a claim of title, as against the United States, to either submerged lands or tidelands adjacent to Guam; nor may they assert similar claims of title as to land which results from the filling of submerged lands or tidelands by such owner, his predecessor, or the United States-----
2. In view of the controlling legal principles relative to tidelands and submerged lands adjacent to a territory of the United States, the language of the Guam Organic Act (48 U.S.C., 1952 ed., sec. 1421f) and transfers of land made pursuant thereto, may not be construed as vesting title or administration of tidelands or submerged lands, filled or otherwise, in the Government of Guam in the absence of specific authorization by the Congress-----
3. The settled law applicable to tidelands and submerged lands adjacent to incorporated territories of the United States is equally applicable to the unincorporated territory of Guam-----

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INDIAN LANDS

DESCENT AND DISTRIBUTION

Generally

1. In probating the restricted estate of a deceased Indian of the Crow Tribe of Indians of Montana, no person can be recognized as the adopted heir of such decedent under the act of March 3, 1931 (46

INDIAN LANDS—Continued

DESCENT AND DISTRIBUTION—Continued

Generally—Continued

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Stat. 1494), unless the adoption was approved in the manner provided by that act. The initiation of certain action to obtain the required approval of the Superintendent is ineffective where such approval was not given, and, therefore, a status as an adopted heir of the decedent is not achieved.....

92

2. Where the evidence upon which an Examiner of Inheritance determined the heirs of a deceased Indian is conflicting and it appears that essential testimony may be available which has not been obtained, the case will be remanded for a further hearing.....

289

Wills

3. The disapproval of a will of an Osage Indian by the authorized representative of the Secretary of the Interior results in a disapproval of the entire instrument, including the revocation clause contained in the will, where the reasons for such disapproval extend to the entire instrument.....

157

4. Where a testator by will revokes a prior will but had included in both instruments similar devises, and there is no reason to suppose that he would have made the change if he had been aware that the change would have been wholly futile, the doctrine of dependent relative revocation should be applied and the revocation clause in testator's later will should be held to be ineffectual to cancel the prior will or to destroy testator's intention to die testate.....

157

5. Where the testamentary capacity of the testator is attacked, or undue influence is charged, and the protestants to an earlier will fail to offer evidence in support of their contentions, and where the Field Solicitor who conducted the will hearing advises that the will was prepared and executed in accordance with the laws of Oklahoma, and that its terms were not unnatural, such instrument will be approved by the Secretary of the Interior in the exercise of his administrative discretion under the applicable statutes.....

157

6. Only such person as shall take under the will or a presumptive heir of the decedent under the succession laws of the State of Oklahoma, has such an interest as will permit him to contest the will of an Osage Indian.....

421

7. A presumptive heir of an Osage Indian, whose relationship to the decedent is too far removed to participate in the estate, has no right to contest the will of such decedent.....

421

8. While an adjudication of a testator's mental incapacity to manage his property is to be considered in the determination of his testamentary capacity, such evidence is not conclusive proof thereof.....

421

9. The proponent of an Osage Indian will is not required to offer further evidence after having presented *prima facie* proof.....

421

10. A will devising most of her estate to her church by an elderly woman, whose nearest relative is a cousin, is not an unnatural will.....

421

11. The limitation imposed by statute upon the qualification of heirs of a decedent of one-half or more Osage Indian blood, is not applicable to the devisees under a will of an Osage Indian.....

421

INDIAN LANDS—Continued

DESCENT AND DISTRIBUTION—Continued

Wills—Continued

Page

12. The previous wills of a testator need not be considered when his last will revokes all former wills and no proof is offered to show that the last will was invalid..... 436
13. The testimony of an attesting witness to a will, who tries to impeach the mental capacity of the testator and the due execution of the will is entitled to little credence and should be viewed with suspicion and caution..... 436
14. Funds paid to an Indian from his individual money account, upon payment, become nontrust property no longer subject to the jurisdiction of the Department of the Interior. The Examiner of Inheritance has no jurisdiction to determine the use of such funds or to order an accounting of the disposition of the funds paid to the Indian from his individual account..... 436
15. An adjudication of a testator's mental incompetency to manage his property is to be considered in the determination of his testamentary capacity, but such evidence is not conclusive proof... 436
16. Testamentary capacity is a state of mental capacity of the business then ensuing, to be able to bear in mind in a general way the nature and situation of the property, to remember the objects of the testator's bounty, and to plan or understand the scheme of distribution..... 436
17. An anticipated refund of taxes paid from the individual account of an Indian, when received, will be included in the estate as omitted property in accordance with 25 CFR 15.31 and the original order of distribution need not be stayed, reconsidered or amended pending the receipt of such a refund..... 436

LEASES AND PERMITS

Minerals

18. Failure on the part of the lessee of a mining lease of Indian lands to exercise diligence in the conduct of the prospecting and mining operations, or failure to act in good faith to develop the land for mining the minerals specified will give cause for the cancellation of the lease..... 365

POSSESSORY RIGHTS

19. It would be an unconstitutional taking to permit the Klamath River (Yurok) Indians to diminish the value of the right of occupancy in Hoopa Valley by paying to them a part of the proceeds of the resources taken therefrom. The Hoopa Indians have occupied this part of the reservation since 1865 and the benefits of such occupancy belong to them..... 59

TIMBER

20. Although no clear authority has been delegated to the Secretary of the Interior to dispose of timber upon allotted Indian land without the consent, express or implied, of all co-owners, he has authority, and also a responsibility to approve and facilitate the sale or other salvage of timber thereon without obtaining unanimous consent, in order to prevent loss from fire, decay, insect infestation or disease... 101

INDIAN LANDS—Continued**TRIBAL LANDS****Generally**

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21. Nothing in the Executive Order of October 16, 1891, indicates an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation. Despite the enlargement of the original Hoopa Valley Reservation, the Klamath River Tribe was never merged with nor absorbed into the Hoopa Valley Tribe. Therefore, the fact that the Hoopa Valley Tribe limited the scope of its jurisdiction under its 1949 constitution does the Klamath River Indians no injustice. As an independent tribal group, neither the Klamath River Indians nor their successors, the Yuroks, have any property right in the original 12-mile square-----

59

INDIAN REORGANIZATION ACT

1. Section 16 of the Indian Reorganization Act was enacted to facilitate and to stabilize tribal political organizations. Section 17 was enacted to permit a tribe so organized to charter a business corporation to facilitate its business activities. They are separate legal entities, having different powers, privileges and responsibilities-----

483

INDIAN TRIBES**GENERALLY**

1. A tribe organized under section 16 of the Indian Reorganization Act is a political body and is a separate entity from a corporation chartered under section 17 of the Indian Reorganization Act, having different powers, privileges and responsibilities-----

483

CONSTITUTIONS

2. Failure of the Secretary of the Interior to disapprove a Tribal Council ordinance which is inconsistent with the tribal constitution does not validate the ordinance-----

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MEMBERSHIP

3. Failure of the Secretary of the Interior to disapprove a Tribal Council ordinance which is inconsistent with the tribal constitution does not validate the ordinance-----

97

RESERVATIONS

4. Inasmuch as the Indian Reorganization Act provided a method of uniting the Hoopa and Klamath River Tribes, and both tribes rejected such a plan, it is our opinion that these groups remain and must be recognized as independent tribal groups until such time as they affirmatively and voluntarily form a consolidated governmental body having jurisdiction over the total reservation both as to government and as to economic resources. Such a confederation or consolidation has not taken place-----

59

TRIBAL GOVERNMENT

5. The Commissioner of Indian Affairs has been correct, as a matter of law, in recognizing tribal title to the communal lands of the 12-mile-square Executive order reservation in the Hoopa Valley Tribe. The Commissioner has been further correct in paying out per capita payments as authorized generally by the act of March 2, 1907 (34 Stat. 1221), to enrolled members of the Hoopa Valley Tribe only-----

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INDIAN TRIBES—Continued

TRIBAL GOVERNMENT—Continued

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6. Nothing in the Executive Order of October 16, 1891, indicates an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation. Despite the enlargement of the original Hoopa Valley Reservation, the Klamath River Tribe was never merged with nor absorbed into the Hoopa Valley Tribe. Therefore, the fact that the Hoopa Valley Tribe limited the scope of its jurisdiction under its 1949 constitution does the Klamath River Indians no injustice. As an independent tribal group, neither the Klamath River Indians nor their successors, the Yuroks, have any property right in the original 12-mile square. 59

INDIANS

DOMESTIC RELATIONS

1. In probating the restricted estate of a deceased Indian of the Crow Tribe of Indians of Montana, no person can be recognized as the adopted heir of such decedent under the act of March 3, 1931 (46 Stat. 1494), unless the adoption was approved in the manner provided by that act. The initiation of certain action to obtain the required approval of the Superintendent is ineffective where such approval was not given, and, therefore, a status as an adopted heir of the decedent is not achieved. 92

MINERAL LANDS

DETERMINATION OF CHARACTER OF

1. The nonmineral character of public land is established by the inclusion of the land in a patent under a railroad land grant which excludes mineral lands and cannot be disturbed after issuance of the patent. 293

MULTIPLE MINERAL DEVELOPMENT

2. Section 7 of the Multiple Mineral Development Act applies to all conflicts between a lessee, applicant, permittee or offeror under the mineral leasing laws and a claimant under the mining laws, including mineral claims based upon minerals now subject to disposition only under the mineral leasing laws. 245
3. Section 7 of the Multiple Mineral Development Act may be invoked against all unpatented mining claims, whether they are identifiable or not or whether the names and addresses of the locators are known or not. 245
4. The fact that an application for a mineral patent has been filed for lands included within an oil and gas lease does not prevent the oil and gas lessee from initiating proceedings under section 7 of the Multiple Mineral Development Act. 245
5. Where an oil and gas lessee initiates action under section 7 of the Multiple Mineral Development Act for land covered by an application for a mineral patent, the proceedings will be allowed to continue through publication and the filing of a verified statement by the patent applicant, but then the section 7 proceedings will be stayed until the patent application is disposed of. 245

MINERAL LEASING ACT**GENERALLY**

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| 1. The Secretary of the Interior is not authorized by law to effectuate the policies of the Mineral Leasing Acts so singlemindedly that he is thereby equally required to ignore the objectives of the wildlife conservation laws..... | 305 |
| 2. The Secretary of the Interior (or his delegate) is authorized by section 29 of the Mineral Leasing Act to issue a permit for slant wells to be drilled through lands subject to that act, even though the land for which the permit is issued is merely covered by offers to lease for oil and gas, but no leases have been issued..... | 417 |

LANDS SUBJECT TO

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| 3. Where the records of the Department show that public lands have been set aside as a permanent addition to an Indian reservation, those lands are not available for oil and gas leasing under the provisions of the Mineral Leasing Act..... | 446 |
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MINES AND MINING

- | | |
|---|-----|
| 1. The Bureau of Mines, pursuant to section 5 of the act of May 16, 1910, as amended (36 Stat. 369; 30 U.S.C. sec. 7), and sec. 212(a) of the Federal Coal Mine Safety Act (66 Stat. 692, 709; 30 U.S.C. sec. 482(a)), has the authority to revise existing regulations or to promulgate new regulations affecting equipment in gassy coal mines whether previously certified as permissible or not, provided, (1) the regulations affect equipment acquired and certified as permissible subsequent to July 16, 1952, and not excluded by the provisions of section 209(f)(1) of the Federal Coal Mine Safety Act; (2) a finding and determination is made by the Bureau based on facts and circumstances not conclusions that the equipment is not experimental but is a demonstrated safety device designed to decrease or eliminate mine fires and explosions caused by the use of such equipment in gassy coal mines; and (3) that the provisions of the Administrative Procedure Act (5 U.S.C. secs. 1001-1011) are followed..... | 211 |
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MINING CLAIMS**GENERALLY**

- | | |
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| 1. An oil and gas lessee is not in the category of those who can and must file an adverse claim against a mining claim during the period of publication of notice of an application for patent to the mining claim..... | 245 |
| 2. Where the records of the Department show a tract of land to be free from an adverse claim, an oil and gas lease issued for such land is prima facie valid even though it appears thereafter that a mineral location has previously been made on the tract..... | 245 |
| 3. Where a mineral claimant applies for a patent for land included within a prima facie valid oil and gas lease, the mineral entry cannot be allowed until the mineral applicant has established the validity of his claim in a contest brought against the oil and gas lease or at a hearing ordered by the Department at which the mineral claimant will have the burden of proof..... | 245 |

MINING CLAIMS—Continued

CONTESTS

Page

4. When the Government charges that no discovery has been made within a mining claim on land open to the operation of the mining laws, the contestee may show that discovery occurred after the contest was initiated, in the absence of a withdrawal of the land from the operation of the mining laws in the interim.----- 1
5. Where evidence introduced by the Government in a contest brought against the validity of a mining claim tends to show that no discovery has been made and where that evidence is supported by evidence of the contestee's witnesses and where the contestee has not been able to produce convincing evidence that a discovery has been made, the Government will prevail and the claim will be declared null and void.----- 1

DETERMINATION OF VALIDITY

6. In determining whether a mining claim is a valid claim, evidence detrimental to the contestee produced at the hearing through the examination and cross-examination of the contestee's witnesses may be considered.----- 1
7. The fact that a mineral locator has filed an application for patent and paid the purchase price does not leave the Secretary of the Interior with only the ministerial function of issuing the patent, but the mining claim is subject to protest and contest to determine its validity.----- 245
8. The Department of the Interior has long recognized a distinction between two categories of cases involving the determination of validity of mining claims, the first category including cases where the validity of a claim turns on the legal effect to be given to facts of record (a question of law) and the second category consisting of cases where the validity of a claim depends upon the resolution of a factual issue (a question of fact). The Department has always held hearings in the second category of cases but not in the first category.----- 336
9. The Administrative Procedure Act does not require the holding of hearings in mining cases where the facts are not in dispute and the validity of a claim presents solely a legal issue; therefore a hearing is not required before holding mining claims to be null and void because at the time they were located the lands were included in outstanding small tract leases.----- 336

DISCOVERY

10. To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed, and marketed at a profit.----- 1
11. When the Government charges that no discovery has been made within a mining claim on land open to the operation of the mining laws, the contestee may show that discovery occurred after the contest was initiated, in the absence of a withdrawal of the land from the operation of the mining laws in the interim.----- 1

MINING CLAIMS—Continued

DETERMINATION OF VALIDITY—Continued

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12. Where evidence introduced by the Government in a contest brought against the validity of a mining claim tends to show that no discovery has been made and where that evidence is supported by evidence of the contestee's witnesses and where the contestee has not been able to produce convincing evidence that a discovery has been made, the Government will prevail and the claim will be declared null and void..... 1
 13. Where the alleged discovery in a mining claim consists only of an indication of tungsten and zirconium which of themselves do not warrant a reasonable man in the further expenditure of time and money with the reasonable prospect of success in an effort to develop a valuable mine, there has been no valid discovery of a valuable mineral deposit within the meaning of the mining laws..... 458
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- LANDS SUBJECT TO**
15. Prior to passage of the act of August 11, 1955, lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to passage of the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location..... 145
 16. Neither the Atomic Energy Act of 1946 nor the Atomic Energy Act of 1954 restored to the operation of the mining laws lands previously reserved or withdrawn from the operation of those laws..... 166
 17. The act of August 11, 1955, the Mining Claims Rights Restoration Act of 1955, did not open to mining location land which was previously withdrawn or reserved for power development or power sites and which, in addition, was withdrawn for reclamation purposes..... 166
 18. Mining claims located on land withdrawn for power site purposes are null and void where such locations were made prior to the act of August 11, 1955..... 166
 19. Prior to passage of the act of August 11, 1955, lands embraced in power site withdrawals were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power site purposes but prior to passage of the act of August 11, 1955, is null and void unless the land embraced in the claim was restored to entry under section 24 of the Federal Power Act at the time of location..... 207
 20. A mining claim is properly declared null and void where the location was made at a time when the land embraced in the claim was included in a proposed withdrawal of the land which would exclude location under the mining laws, and where notice of the proposed withdrawal was recorded on the serial register and tract books of

MINING CLAIMS—Continued**LANDS SUBJECT TO—Continued**

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the land office—the notation having the effect of segregating the lands included in the proposed withdrawal from location under the mining laws to the extent that the withdrawal, if effected, would prevent such disposal.....

207

21. An attempt to locate a mining claim made while the land is included in an application to withdraw the land from location or entry under the general mining laws for the use of a Federal agency is invalid since the notation of the filing of the application on the land office records segregates the land from lands available for disposal under the public land laws to the extent that the proposed withdrawal would.....

485

22. Lands in power site withdrawals were not open to location of mining claims until the adoption of the Mining Claims Rights Restoration Act of 1955 on August 11, 1955, and any attempted location before that time subsequent to the withdrawal of the land for power site purposes is null and void.....

485

LOCATION

23. Prior to the enactment of the act of July 23, 1955 (69 Stat. 367; 30 U.S.C., 1952 ed., Supp. IV, sec. 601), no right-of-way across a valid, unpatented mining claim which would continue after patent could be initiated solely through construction by the United States. The act above cited, which reserved to the United States the right of access across unpatented mining claims, was limited in its effect to the period "prior to the issuance of patent" to the claim and cannot be construed to authorize such access across such a claim after issuance of patent.....

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MILL SITES

24. A mill site which is used solely in connection with placer claims is invalid.....
25. A mill site which is not used for mining or milling purposes in connection with a lode claim and which does not contain a quartz mill or reduction works is invalid.....

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PATENT

26. Prior to the enactment of the act of July 23, 1955 (69 Stat. 367; 30 U.S.C., 1952 ed., Supp. IV, sec. 601), no right-of-way across a valid, unpatented mining claim which would continue after patent could be initiated solely through construction by the United States. The act above cited, which reserved to the United States the right of access across unpatented mining claims, was limited in its effect to the period "prior to the issuance of patent" to the claim and cannot be construed to authorize such access across such a claim after issuance of patent.....

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POSSESSORY RIGHT

27. Possession of the surface of the land included in an unpatented mining claim does not permit the locator to use the mining claim for grazing purposes or to grant this privilege to others.....

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MINING CLAIMS—Continued**SPECIAL ACTS**

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29. Neither the Atomic Energy Act of 1946 nor the Atomic Energy Act of 1954 restored to the operation of the mining laws lands previously reserved or withdrawn from the operation of those laws.....	166
30. The act of August 11, 1955, the Mining Claims Rights Restoration Act of 1955, did not open to mining location land which was previously withdrawn or reserved for power development or power sites and which, in addition, was withdrawn for reclamation purposes.....	166
31. Verified statements required under the act of July 23, 1955, are properly rejected and the use of surface resources denied to the mining claimants when such statements are filed after termination of the period of 150 days prescribed by the statute for filing such statements.....	481
32. Where the deposits for which a mining claim has been located are a common variety of sand or stone, are of widespread occurrence, and are the country rock of the area, they are materials which the act of July 23, 1955, has removed from the category of valuable mineral deposits locatable under the mining laws and the fact that they, in common with all similar materials, may be of use and value for commercial purposes does not exempt them from the stricture of the statute.....	458

SURFACE USES

33. Verified statements required under the act of July 23, 1955, are properly rejected and the use of surface resources denied to the mining claimants when such statements are filed after termination of the period of 150 days prescribed by the statute for filing such statements.....	481
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WITHDRAWN LAND

34. Prior to passage of the act of August 11, 1955, lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to passage of the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location.....	145
35. Neither the Atomic Energy Act of 1946 nor the Atomic Energy Act of 1954 restored to the operation of the mining laws lands previously reserved or withdrawn from the operation of those laws.....	166
36. The act of August 11, 1955, the Mining Claims Rights Restoration Act of 1955, did not open to mining location land which was previously withdrawn or reserved for power development or power sites and which, in addition, was withdrawn for reclamation purposes.....	166
37. Mining claims located on land withdrawn for power site purposes are null and void where such locations were made prior to the act of August 11, 1955.....	166

NOTICE

Page

1. Section 31 of the Mineral Leasing Act, authorizing cancellation of a noncompetitive oil and gas lease for failure to comply with the terms of the lease after 30 days' notice sent by registered mail to the record address of the lease owner, is fully complied with when the default notice was sent to a person representing himself as attorney for the lease owners, and where all previous notices had been addressed in care of such attorney and the lease owners had never indicated any other address to which notices and communications concerning the lease should be sent.....

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OIL AND GAS LEASES

GENERALLY

1. A remote assignee of an oil and gas lease has no standing, in the absence of supporting evidence, to claim that the original lessee did not consent to the terms of the lease as it was issued.....
2. Where all the oil and gas lease offerors are maintaining both public domain and acquired lands offers for the same tracts of land, where no one of them is insisting that a lease must be issued only under one type of offer to the exclusion of the other but each is willing to accept either type of lease, where the Director in a carefully considered opinion found the lands to be leasable only as public domain, and where there is no obvious error in the Director's determination, there is no necessity to disturb the Director's determination.....

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ACQUIRED LANDS LEASES

3. Where the United States quitclaims to private persons the mineral rights (excepting and reserving only coal) in acquired lands on which oil and gas leases are outstanding and the quitclaim deed does not except or reserve to the United States any right or interest as lessor under the oil and gas leases, the Department retains no jurisdiction over the mineral interests covered by the leases and after execution and delivery of the deed, the grantees of the United States become the lessors of the oil and gas leaseholds.....

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APPLICATIONS

4. In order to have segregative effect so as to prevent land from being open to filing, an application for a 5-year extension of an oil and gas lease covering the land must be filed by the record titleholder of the lease, an assignee whose assignment has been filed for approval, an operator whose operating agreement has been filed for approval, or one who purports to act as agent for any of these persons.....
5. An applicant for an oil and gas lease acquires no vested right to have a lease issued but only an inchoate right to receive a lease over a later applicant if a lease is issued.....
6. An applicant for a noncompetitive oil and gas lease who filed his offer prior to the amendment of the Mineral Leasing Act by the act of July 29, 1954, had no right to have a lease issued to him after that date subject only to the provisions of the Mineral Leasing Act as it existed prior to the amendments of that date, and the Secretary of the Interior had no authority to issue a lease after July 29, 1954, free from the amendments made on that date merely because the offer for the lease was filed prior to that date.....

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OIL AND GAS LEASES—Continued

APPLICATIONS—Continued

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7. Where land is shown in the tract book as being included in an out- standing oil and gas lease and the lease in fact has been relinquished and a second lease has been issued for the land and also terminated, all without any notation in the tract book of the termination of the first lease and of the issuance and termination of the second lease, the land does not become available for filing subsequent to the termination of the second lease.....	185
8. Where land is shown in the tract book as being included in an out- standing oil and gas lease and the lease in fact has been relinquished and a second lease has been issued for the land and also terminated, and the tract book shows the termination of the second lease but not the termination of the first lease, the land does not become available for filing subsequent to the notation of termination of the second lease.....	185
9. A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even though the notation on the tract book of the existence of a prior lease may not have been made until the same date that a relinquishment of the lease was noted, and an application filed prior to the notation of the relinquishment is prematurely filed and must be rejected.....	227
10. An oil and gas application filed prior to the notation on the appropriate tract book of the relinquishment of a prior lease on the land applied for must be rejected because the land is not available for further leasing until such notation is made.....	227
11. Where a lease is offered to an applicant subject to a restricted drill- ing provision, whether the applicant will be able to operate the lease in accordance with the restriction is a matter pertaining to performance of lease obligations and not to his qualifications as an applicant for the lease.....	257
12. An application for a noncompetitive oil and gas lease of lands patented under a railroad land grant must be rejected because the United States does not own such lands or the mineral deposits in the lands.....	293
13. Where an offeror describes a tract of unsurveyed land by reference to nonexistent corners of an unofficial survey created by projection on an 1898 map whose topographical features have been greatly altered by time and by words referring to existing features and it is not possible to identify the land applied for without consulting other maps and records, which have not been filed with the offer and are not part of the record in the case, the offer must be rejected for failure to identify the land applied for when a proper interven- ing offer has been filed.....	369
14. An oil and gas offer for unsurveyed public land which does not tie the metes and bounds description to a corner of a public land survey, as required by the pertinent regulation, is defective and earns the offeror no priority.....	369

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15. Where an oil and gas lease offer for an unsurveyed tract of land contains a metes and bounds description consisting partly of references to natural features of topography and partly to the lines of unofficial sections created by projection, but the offer is accompanied by an up-to-date map on which is shown in great detail natural and artificial structures, contour lines, degrees of latitude and longitude, and other items, and on which the areas applied for are clearly demarcated and where the area applied for can be accurately located on the earth's surface, the metes and bounds description is not defective because it is not limited solely to lines connecting natural and artificial monuments.----- 369
16. Where a metes and bounds description of an unsurveyed tract in an oil and gas lease offer is tied to the corner of an approved public land survey and where it is possible to identify the area applied for accurately from the words of description in the offer and an accompanying map which is part of the offer, the fact that the corner used as a tie may no longer be existent does not render the offer invalid.----- 369

ASSIGNMENTS OR TRANSFERS

17. Any assignors as well as assignees are parties in interest to a decision which vacates in part prior decisions approving their assignment of oil and gas leases, and failure to include an assignor as a party in interest to such a decision by the Acting Director of the Bureau does not defeat the right of the assignor to appeal to the Secretary therefrom.----- 299
18. For leases to become segregated through assignment, and thus entitled to the extension authorized for segregated leases, an assignment must be filed when there is at least one lease month remaining in the term of the lease. A partial assignment filed during the last month of the lease term cannot become effective to segregate the lease and to entitle the segregated portions to any extension. *Humble Oil & Refining Company, 64 I.D. 5 (1957), distinguished. Associate Solicitor's opinion (M-86443) (June 4, 1957), overruled in part.*----- 316
19. Regardless of when approval is given to an assignment of a portion of an oil and gas lease, the assignment, when approved, is effective from the first day of the lease month following the date of its filing in the proper land office.----- 316
20. Instruments in which an assignor agrees to "sell, assign, convey, transfer, and set over" portions of two leases and the assignee obtains all of the assignor's right under the leases to produce oil or gas from zones below 4,000 feet are assignments and not "subleases in the nature of operating agreements" even though, by separate agreement, the parties to the assignments mutually promise that under certain conditions either party will transfer his interest in the leases to the other party.----- 348
21. Where there is a dispute between the parties to a transfer of interests in an oil and gas lease as to whether the transfer constitutes an assignment of record title or an operating agreement, the Department will not approve the transfer until the dispute is resolved by the parties or the courts.----- 348

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22. Under section 30(a) of the Mineral Leasing Act, as enacted on August 8, 1946, an assignment or a sublease of an oil and gas lease cannot take effect unless three original executed counterparts thereof are filed in the proper land office, and this requirement is applicable to assignments filed for approval after that date even though the assignments were executed prior to that date..... 348

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23. A noncompetitive oil and gas lease on lands not known to contain valuable deposits of oil or gas is properly canceled where the lessees are notified by registered mail that either a bond must be filed or advance rental must be paid under their lease and that if the default continues after 30 days from service of notice thereof the lease will be canceled without further notice, and where the lessees did not comply with the requirement..... 361
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28. In order to have segregative effect so as to prevent land from being open to filing, an application for a 5-year extension of an oil and gas lease covering the land must be filed by the record titleholder of the lease, an assignee whose assignment has been filed for approval, an operator whose operating agreement has been filed for approval, or one who purports to act as agent for any of these persons..... 12
29. Where an oil and gas lessee applies for an extension of his entire lease despite the fact that he had previously assigned a portion of his lease to another and the assignment has been approved, he will not be considered to be an apparent or ostensible agent for the assignee in applying for the extension where there is no evidence that the lessee has ever been held out to be an agent of the assignee..... 12

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| 30. Where an oil and gas lessee applies for an extension of his entire lease despite the fact that he had previously assigned a portion of his lease to another and the assignment has been approved, he will not be considered to be the agent of the assignee in applying for the extension where there is no proof that he was designated as the assignee's agent and the circumstances surrounding his applying for the extension not only fail to show that he was acting as agent but show a situation inconsistent with the concept of agency..... | 12 |
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37. Where the average production of oil from a leasehold is 15 barrels per well per day or less, and the aggregate of the overriding royalties from production and the royalty payable to the United States exceeds that specified by departmental regulation 43 CFR 192.83, the lease is properly held to be in default if the overriding royalties are not reduced in accordance with 43 CFR 192.83. ----- Page 432

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38. A lease is exempted from the automatic-termination-for-failure-to-pay-rental provision only if it contains a well capable of producing oil or gas in paying quantities; such a well is one that is actually in condition to produce production which exists in paying quantities and not one that is mechanically unable to produce because the casing has not been perforated and has only prospects of being a commercial well. ----- 106

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40. The act of July 29, 1954, which provides for the automatic termination of leases upon failure of the lessee to pay the annual rental when it is due, does not permit a lessee, by submitting a partial payment of the annual rental for designated acreage in his lease, in effect to relinquish a portion of his lease and to have the portion of the lease represented by the partial payment continue in effect. ----- 281

RENTALS

41. The provision of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease applies to a lease issued prior to July 29, 1954, only if the lessee has filed a written notice of his consent to have his lease bound by that provision. ----- 25
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43. A lease is exempted from the automatic-termination-for-failure-to-pay-rental provision only if it contains a well capable of producing oil or gas in paying quantities; such a well is one that is actually in condition to produce production which exists in paying quantities and not one that is mechanically unable to produce because the casing has not been perforated and has only prospects of being a commercial well. ----- 106

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OUTER CONTINENTAL SHELF LANDS ACT(See also *Oil and Gas Leases*.)**GENERALLY**

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1. The validation provisions of the Outer Continental Shelf Lands Act, when read in conjunction with the Submerged Lands Act, effectuate the legislative objective of protecting equitable interests of persons or companies holding State-issued leases, and the intent of the parties to such leases will be given proper weight in determining whether such leases cover outer Continental Shelf lands.....

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2. Applications for validation of State leases purportedly covering outer Continental Shelf lands must be considered in the light of the clear wording of the acts of Congress establishing an equitable basis for approval of such applications by the Secretary of the Interior, as well as the general import of the submerged lands decisions of the United States Supreme Court.....

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BOUNDARIES

3. In deciding applications of State lessees for validation of leases in disputed offshore areas, the Secretary of the Interior will adhere to the position taken by the Attorney General in current litigation of issues relating to the location of seaward boundaries of the lessor State....
4. Where a State lease issued in 1936 purports to cover lands "to the extreme limit * * * of the domain, territory and sovereignty" of the State, it will be construed as intended to apply to all lands historically claimed by the State for purposes of validation under the Outer Continental Shelf Lands Act.....

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STATE LEASES**Generally**

5. Where a State lease is ambiguous as to extent, such lease for the purposes of validation will not be construed as including lands in the Gulf of Mexico beyond a line 3 marine leagues from the shoreline, inasmuch as Congress rejected State claims beyond that line in enacting the Submerged Lands Act.....

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Recognition of

6. The fact that an applicant for validation of a State lease files a certificate pursuant to section 6(a)(3)(A) of the Outer Continental Shelf Lands Act does not limit the authority of the Secretary to make his own determination under section 6(a)(2) of the act.....
7. The Secretary of the Interior has final administrative authority to determine under the provisions of the Outer Continental Shelf Lands Act whether a State lease offered for validation covers submerged lands of the outer Continental Shelf.....

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PATENTS OF PUBLIC LANDS**AMENDMENTS**

1. By departmental regulation entries which are void *ab initio* are not subject to adjustment or amendment under section 2372 of the Revised Statutes, as amended.....
2. Patents to public land cannot be amended pursuant to section 2372 of the Revised Statutes, as amended, where the showing required by the statute as to the circumstances of the error is not made....

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PATENTS OF PUBLIC LANDS—Continued

AMENDMENTS—Continued

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3. Section 2372 of the Revised Statutes, as amended, authorizing the amendment of entries and patents in order to correct errors in the description of lands entered and the regulations issued pursuant thereto do not permit amendment of a patent in behalf of persons who are not transferees deriving title from the one who entered or located the land covered by the patent the amendment of which is being sought or transferees of such entryman as to the land which it is sought to have the patent amended to cover..... 284

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PUBLIC LANDS

GENERALLY

1. Where all the oil and gas lease offerors are maintaining both public domain and acquired lands offers for the same tracts of land, where no one of them is insisting that a lease must be issued only under one type of offer to the exclusion of the other but each is willing to accept either type of lease, where the Director in a carefully considered opinion found the lands to be leasable only as public domain, and where there is no obvious error in the Director's determination, there is no necessity to disturb the Director's determination..... 369

PUBLIC SALES

GENERALLY

1. Where land has been classified as suitable for disposition by direct sale under the Small Tract Act, the sale has been held, the purchasers declared, cash certificates issued, and the purchasers have complied with all the requirements of the statute and regulation, a protest against the sale on the ground that the land was improperly classified will be entertained..... 265

PREFERENCE RIGHTS

2. A document submitted under the pertinent regulation, as supporting proof of a preference-right claim, which consists only of a statement by a title company that the claimant is the grantee in the last recorded deed conveying adjoining land is insufficient either as an abstract of title or certificate of title to establish ownership in the claimant of such land..... 33
3. Under the pertinent regulation proof of ownership of adjoining lands submitted in support of a preference-right claim is acceptable so long as it establishes ownership at or after the date of the sale, within the preference-right period, even though it is dated prior to the date on which the preference-right claim is filed..... 33
4. Under the pertinent regulation a document submitted in proof of a preference-right claimant's ownership of adjoining land, proper in all other respects, is not to be rejected merely because it is not

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SALES UNDER SPECIAL STATUTES

5. In proceedings under Private Law 654 (84th Cong., 2d sess.), purchasers of land under the Alaska Public Sales Act who have paid the full purchase price for the land and who assert that they have performed the requirements for receiving patents on the land will be granted a hearing on the question whether they have complied with those requirements.....

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RAILROAD GRANT LANDS

1. After issuance of patent to a railroad for place lands under its land grant, title is vested in the railroad; the United States does not own the patented land and must reject offers to lease for oil and gas in such land.....

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(See also *Administrative Procedure Act.*)

GENERALLY

1. The Bureau of Mines, pursuant to section 5 of the act of May 16, 1910, as amended (36 Stat. 369; 30 U.S.C. sec. 7), and sec. 212(a) of the Federal Coal Mine Safety Act (66 Stat. 692, 709; 30 U.S.C. sec. 482(a)), has the authority to revise existing regulations or to promulgate new regulations affecting equipment in gassy coal mines whether previously certified as permissible or not, provided, (1) the regulations affect equipment acquired and certified as permissible subsequent to July 16, 1952, and not excluded by the provisions of section 209(f)(1) of the Federal Coal Mine Safety Act; (2) a finding and determination is made by the Bureau based on facts and circumstances not conclusions that the equipment is not experimental but is a demonstrated safety device designed to decrease or eliminate mine fires and explosions caused by the use of such equipment in gassy coal mines; and (3) that the provisions of the Administrative Procedure Act (5 U.S.C. secs. 1001-1011) are followed.....

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APPLICABILITY

2. A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even though the notation on the tract book of the existence of a prior lease may not have been made until the same date that a relinquishment of the lease was noted, and an application filed prior to the notation of the relinquishment is prematurely filed and must be rejected.....

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VALIDITY

3. Where in a private-law Congress requires that a party, in order to obtain certain relief, be found to have complied with the requirements of a statute and the regulations issued thereunder, the validity of the regulations is not open to attack in a proceeding to determine compliance.....

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RIGHTS-OF-WAY

(See also *Indian Lands, Outer Continental Shelf Lands Act.*)

GENERALLY

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1. Prior to the enactment of the act of July 23, 1955 (69 Stat. 367; 30 U.S.C., 1952 ed., Supp. IV, sec. 601), no right-of-way across a valid, unpatented mining claim which would continue after patent could be initiated solely through construction by the United States. The act above cited, which reserved to the United States the right of access across unpatented mining claims, was limited in its effect to the period "prior to the issuance of patent" to the claim and cannot be construed to authorize such access across such a claim after issuance of patent.....

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ACT OF FEBRUARY 25, 1920

2. The Secretary of the Interior (or his delegate) is authorized by section 29 of the Mineral Leasing Act to issue a permit for slant wells to be drilled through lands subject to that act, even though the land for which the permit is issued is merely covered by offers to lease for oil and gas, but no leases have been issued.....

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1. It is proper for the Eastern States Office of the Bureau of Land Management, on its own motion, to reconsider its decisions prior to an appeal to the Director, even though there are adverse rights present..

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2. An appeal to the Secretary of the Interior will be dismissed and the case closed where the appellant fails to pay the filing fee within the time required by the rules of practice.....
3. On an appeal to the Secretary from a decision denying an appeal from an examiner's decision which held 12 mining claims and a mill site null and void, a requirement that a \$5 filing fee for each separate mining claim and the mill site accompany the notice of appeal was proper.....
4. By departmental regulation (43 CFR, 1957 Supp., 221.95(d)), where a party is represented by an attorney, service of any document relating to the proceeding upon such attorney will be deemed to be service on the party he represents, and service of a copy of a decision on an attorney of record is notice of receipt of the decision to the party he represents.....

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6. Where a decision of the manager of a land office gives an applicant for an extension of an oil and gas lease 30 days in which to file a bond or to take an appeal, failing in which the application for extension will be denied and the lease deemed to have expired, and the applicant does neither within the time allowed, he loses his right to have the manager's decision reviewed on the merits.....

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7. The action of a prime contractor in filing a claim with the contracting officer on behalf of a subcontractor does not in itself suffice to ground an appeal to the Board of Contract Appeals that is subsequently taken by the subcontractor alone. A provision in a subcontract making the subcontractor subject to all the terms of the prime contract is insufficient to create privity of contract between the Government and the subcontractor, even though the prime contract provides also that all subcontracts shall be subject to the approval of the contracting officer 274
8. An order of a hearing examiner denying a motion to postpone a hearing is not an appealable order and the movant has no right to appeal from the denial of his motion 282
9. Any assignors as well as assignees are parties in interest to a decision which vacates in part prior decisions approving their assignment of oil and gas leases, and failure to include an assignor as a party in interest to such a decision by the Acting Director of the Bureau does not defeat the right of the assignor to appeal to the Secretary therefrom 299
10. Where one who was not a party to a decision by the Acting Director of the Bureau of Land Management, but who should have been made a party to the decision, had notice of the decision and appealed therefrom to the Secretary, his appeal will be considered on its merits and a motion to dismiss the appeal because of the appellant's lack of standing as a party to the proceedings will be dismissed 299

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11. Where an appellant states merely that there has been an erroneous interpretation of the law, without pointing out wherein the decision appealed from is believed to be erroneous, the appellant has failed to state reasons for his appeal, as required by the rules of practice, and the appeal will be dismissed 290
12. Where an appellant states merely that there has been an erroneous interpretation of the law and regulations, without specifying in what manner either the law or the regulations may have been erroneously construed, the appellant has failed to state reasons for his appeal, as required by the rules of practice, and the appeal will be dismissed 316
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